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No.

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ALEXANDER L. STEVAS.

SUPREME COURT OF THE UNITED STATES

October Term, 1982

HUSTLER MAGAZINE, INC., a corporation, and CHIC MAGAZINE, INC., a corporation,

Petitioners,

VS.

EASTMAN KODAK COMPANY, a corporation,

Respondent.

WRIT OF CERTIORARI
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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1. QUESTIONS PRESENTED FOR REVIEW.

- the form of pictures "based upon fear of criminal prosecution" under state and federal statutes by one who has received state and federal trademark and patent grants constitute state action?

 Included within this broader issue are the following latent questions:
- 1.1.1. Does the standard for measurement of significant governmental involvement to constitute state action vary with the wrong charged such that the "state compulsion test" repeatedly applied by this Court in race discrimination cases can properly be ignored where race discrimination is not involved (which position some lower courts have adopted based upon Justice Brennan's concurring and dissenting opinion in Adickes v. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598 (1970)) or does this Court's decision in Lugar v. Edmondson Oil Co.,

Inc., U.S. ___, 102 S.Ct. 2744 (June
25,1982) command consistent application of
the state compulsion text?

"public function test" as an alternative basis for finding state action inapplicable by reason of Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 98 S.Ct. 1729 (1979) in all private commercial transactions (as successfully urged by Respondent in the lower courts, but contrary to a long line of other cases) or does Flagg prohibit such application to the more limited aspect of private commercial transactions involved in the "settlement of disputes between debtors and creditors"?

ence of state action under the "nexus test", is the grant of state and federal trademark and patent monopolies to be treated as the leasing of public property (held sufficient under Burton v. Wilmington Parking Authority,

365 U.S. 715, 81 S.Ct. 856 (1961)) or as the ministerial acts of granting corporate charters, licenses and permits (which have been found to be insufficient)?

owner of pictures entitled to a determination of the constitutionality of the application of state and federal statutes which require confiscation of pictures by a film processor, without due process or compensation, where the pictures have not yet been subjected to editorial process from which it is determined if the picture should be published, if so what portion, if so in what context within the individual article, and if so the overall content of the magazine?

1.3. May obscenity statutes be applied to require censorship by private parties of materials in the prepublication stage without the procedural due process protections heretofore prescribed by this Court?

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Petitioners1/ respectfully pray that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") to review the final order of that court entered on September 16, 1982 in case numbers 80-6077 and 80-5861 which affirmed the judgment entered in the United States District Court for the Central District of California ("District Court") on November 14, 1980 in case number CV 80-561 IH based upon an order entered September 29, 1980 granting Respondent's motion for summary judgment.

> OPINIONS BELOW. The opinions below are unreported. Copies of

^{1/} The caption lists all parties (Rule 21.1(c)). L.F.P., Inc. is Petitioners' parent company, and there are no affiliates or subsidiaries other than wholly owned subsidiaries of one of the Petitioners except LFZ, Ltd., a subsidiary of Hustler Magazine, Inc. Petitioners are unaware of Respondent's parent, subsidiary or affiliated companies.

opinions are included in Appendix A.2/

3. JURISDICTION THIS COURT. The judgment sought to be reviewed is the Order of the Ninth Circuit filed September 16, 1982 affirming November 14, 1980 District Court, Judgment for Respondent based on September 29, 1980 District Court Order granting Respondent's motion for summary judgment. On November 15, 1982, the Ninth Circuit denied Petitioner's Petition For Rehearing and the Request for Rehearing en banc filed September 30, 1982. On January 24, 1983, this Court extended the time for this Petition to March 19, 1983. This Court has jurisdiction of a petition for writ of certiorari under 28 U.S.C. \$1254.

^{2/} With this Petition are two appendices each being filed under separate cover pursuant to Rule 21(k). All references herein (1) to "App." are to Appendix A (and the page numbers thereof are preceded by the letter "A"), or (2) to "Ex." are to Appendix B (Excerpts filed in Court of Appeals).

- 4. CONSTITUTION AND STATUTES. This case involves the following constitutional provisions and statutes, the pertinent text of which is set forth in App. A-54-58: First Amendment to United States Constitution, Fourteenth Amendment to United States Constitution ("Amendment to United States Constitution ("Amendment(s)"), 18 U.S.C. \$\$1461, 1462 and 1465 ("\$\$1461-5"), 28 U.S.C. \$2201, 42 U.S.C. \$1983 ("\$1983") and California Penal Code \$311.2 ("\$311.2").
- 5. STATEMENT OF CASE. Petitioners

 (Plaintiffs and Appellants below)

 gave film to Respondent (Defendant and Appellee below and sometimes called "Kodak") for developing. Respondent confiscated the developed pictures 3/

In this case the pictures are in the form of transparencies. Pictures are within the ambit of protection of the First Amendment of the United States Constitution ("First Amendment"). N. 7 in Erznoznik v. City of Jacksonville, 422 U.S. 205,211, 95 S.Ct. 2268,2273 (1975). "[P]lays, motion pictures and photographs are protected forms of expression, (cont'd)

(App. [see N.2, supra] 14:25) pursuant to its policy adopted because of its fear of prosecution under, and therefore under color of, both federal and State laws. (Trial Court's findings at App. 38:24, 40:12 and 40:23 and Respondent's concession at Ex. [see N.2, supra] 103-107, [quoted in part at N.5 App. A-62] and App. A-111 and A-123 [quoted in §8.2 infra].) Petitioners are unable to obtain quality processing from other sources. (Ex. 279:14, 296:5, 301:19, 306:16, 310:22.)

Respondent's developing film for a publisher is merely an early intermediate

^{3/ (}cont'd) Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495,502, 72 S.Ct. 777 (1952)." Magazines are likewise protected, and are presumptively protected material under the First Amendment. Penthouse Intern., Ltd., v. McAuliffe, 610 F.2d 1353,1359 (5th Cir. 1980). "It is of no significance that expression which is protected by the First Amendment takes place in a commercial setting. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 83 S.Ct. 631 (1963)."

step in Petitioners' publication process (Ex. 274:15-278:21) and Respondent is aware of that fact (Ex. 124:21). Although Respondent has the pictures 4/ (and Petitioners have not seen them), Respondent's motion for summary judgment neither attaches nor describes the withheld pictures.5/

Petitioners' evidence (Ex. 276-278) shows that none of the following is

^{4/} Petitioners submitted clear evidence that while the pictures held by Respondent may be under others' names, Respondent is withholding films belonging to Petitioners. (Ex. 289 to 293, 310:8, 312 and 313.) The District Court found that Respondent has retained and refused to deliver the pictures (Ex. 365:25), and Respondent at oral argument (Ex. 366:9) and in its brief to the North Circuit (App. A-110) accepted this finding.

^{5/} Petitioners do not believe that the contents of such transparencies is relevant in this litigation much less in the summary judgment motion. Obviously no one can say what the film never even presented to Respondent (because of Respondent's confiscation practice) would have shown.

known: (1) how the confiscated transparencies would have been altered before publication, (2) which of the transparencies would have been used at all, (3) what the size of the pictures in the magazine would be, (4) the content of the text of article in which the pictures would appear, or (5) the overall content of the magazine. 6/

^{6/} Respondent by footnote to its trial court brief (Ex. 73) without any supporting foundation in any sworn statement refers to an attachment which purportedly contains copies of other publications by the Petitioners which obviously do not include transparencies which the Respondent has withheld. Assuming the attachments to Respondent's counsel's brief had been proved to be Petitioners' product, they still would not evidence. First, they do not demonstrate whether these (or any other) particular pictures in Respondent's hands would ever be used for the above reasons. Secondly, in United States v. Tupler, 564 F.2d 1294,1297-1298 (9th Cir. 1977), the Court stated that evidence "that both the sender and the recipient of the shipment were dealers in sexually explicit materials; that one of the suspects in the case had previously been convicted of an obscenity offense and was currently under indictment for another; and that the clerk in the consignee bookstore (cont'd)

Petitioners filed their Complaint in four counts, the first of which is for anti-trust violations. The second?/ and

^{6/ (}cont'd) described similarly labeled films as 'hard core' do not constitute evidence of the motion picture film under consideration." Nor may reference be made to prior publications of Petitioners. A restraint which "operates to suppress, on the basis of previous publications" is unconstitutional. Organization For A Better Austin v. Keefe, 402 U.S. 415,418, 91 S.Ct. 1575,1577 (1971).

^{7/} The second count of the instant Complaint is brought under \$1983 which requires that the challenged conduct be done "under color of any statute, ordinance, regulation, custom or usage, of any State or Territory." "The under color of law requirement of \$1983 has been treated as the equivalent of the state action requirement of the Fourteenth Amendment."

Adams v. Southern Calif. First Nat. Bank,

492 F.2d 324,329 (9th Cir. 1973). "In United States v. Price, 383 U.S. 787, 794, n. 7, 86 S.Ct. 1152, 1157 n. 7, (1966), we explicitly stated that the requirements were identical: 'In cases under \$1983, "under color" of law has consistently been treated as the same thing as the "state action" required under the Fourteenth Amendment.'" Lugar v. Edmondson Oil Co., Inc., U.S. ____, 102 S.Ct. 2744, 2749 (June 25, 1982). For purposes of determining whether a private party is subject to prohibitions of the Amendments to the Constitution, "state action" includes both federal action and action by one of the several states (Simkins v. Moses (cont'd)

third counts seek damages and injunctive relief under \$1983 and the First and Fourteenth Amendments, respectively, by reason of Respondent's interference under color of law with Petitioners' exercise of their rights of free speech. Count 4 further seek a declaration that \$\$311.2 and 1461-5 cannot be applied so as to subject a film processor to criminal prosecution for returning pictures to the owner for possible subsequent use in a magazine, and thereby indirectly censor

^{7/ (}cont'd) H. Cone Memorial Hospital, 323 F.2d 959,967 (4th Cir. 1963)), but might technically better be described generically as "governmental action" (N.5, Jackson v. Statler Foundation, 496 F.2d 623,627 (2nd Cir. 1974)). Respondent concedes that in light of the third count, seeking recovery based upon the First and Fourteenth Amendments, the determination of governmental action (state action) must consider not only the involvement of the State of California, but also the United States. (Ex. 84:17.) While "governmental" would be better descriptive, since the words "state action" have been repeatedly used to include both federal and State actions, we shall refer to "governmental action" or "state action" interchangeably to include both federal and State action.

the publisher through prior restraint.

Respondent filed its answer and a motion for summary judgment. On September 22, 1980, the District Court announced its decision to grant the motion as to the second, third and fourth counts and to grant the motion (to dismiss) the first count, with leave to amend within ten days.8/

An action for mere possession would be fruitless in that by the time transparencies are returned they would be of little, if any, value. (Ex. 273:7-284:4.) Petitioners are in a position where they have no relief available for Respondent's wrongful censorship and confiscation unless they can receive relief under \$1983 or the Pirst or Fourteenth Amendments or can obtain a declaration that application of the statutes to require such censorship

^{8/} No amendment was filed and Petitioners seek no review of the portion of Judgment based on dismissal of Count 1.

and confiscation is unconstitutional.

6. JURISDICTION -- LOWER COURTS.

The district court had subject matter jurisdiction of Count 2 thereof under 28 U.S.C. \$1343(3), and of Counts 3 and 4 under 28 U.S.C. \$1331. The Ninth Circuit had jurisdiction under 28 U.S.C. \$1291.

REASONS FOR GRANTING WRIT.

- 7.1. The Ninth Circuit's decision that censorship based upon fear of criminal prosecution under state and federal statutes does not constitute state action is in direct conflict with the decision of the Fourth Circuit. (\$8.3.1.2., below.)
- 7.2. The Ninth Circuit by affirming the District Court's
 decision "for the reasons announced by
 the district court" (App. A-1) ruled
 that decisions in race discrimination

cases plying the "state compulsion test" were inapplicable to other cases, thereby establishing a hierarchy of constitutional rights. Either that decision is in conflict with the applicable decisions of this Court or if the decisions of this Court have not settled the matter, then it is an important question of federal law which should be settled by this Court.

7.3. The important question of federal law as to whether the "public function test" is to be inapplicable in all private commercial transactions or only in those involving the "settlement of disputes between debtors and creditors" has not been, but should

^{9/} Adickes v. Kress & Co., 398 U.S. 144, 80 S.Ct. 1598 (1970), Robinson v. State of Florida, 378 U.S. 153, 84 S.Ct. 1693 (1964); and Peterson v. City of Greenville, S.C., 373 U.S. 245, 83 S.Ct. 119 (1963).

^{10/} So denominated in <u>Lugar</u>, <u>supra</u>, <u>U.S.</u> at ___, 102 S.Ct. at 2755 (June 25, 1982) citing <u>Adickes</u>, <u>supra</u>.

be settled by this Court.

- 7.4. Whether the grant of trademark and patent monopolies
 which serve to enable a defendant's wrong
 are sufficient to constitute state action
 is an important question which has neither
 been decided by this Court nor by any
 court in a published decision (App. A-122),
 and should be settled by this Court.
- 7.5. The rulings of the lower courts here approve the application of obscenity statutes to require censorship by private parties of materials in a pre-editorial stage without consideration of (1) how the materials will ultimately appear in published version, (2) the entire article of which the materials would become a part, or (3) the entire magazine issue of which the article would become a part, and in so doing either conflict with the applicable decisions of this Court, or decide an important question of federal law which

has not been, but should be, settled by this Court.

7.6. The rulings of the lower courts in this case approve the application of obscenity statutes to require censorship by private parties of materials in the pre-publication stage without procedural due process protections, and as such either are in conflict with the applicable decisions of this Court or decide an important question of federal law which has not been, but should be, settled by this Court.

8. ARGUMENT.

8.1. Standard Of Review. The standard of review of the granting of summary judgment is set out in Heiniger v. City of Phoenix, 625 F.2d 842,843 (9th Cir. 1980) as follows:

"STANDARD OF REVIEW

"A reviewing court will affirm a grant of summary judgment only if it appears from the record, after viewing all evidence and factual interferences in the light most

favorable to the appellant, that there are no genuine issues of material fact and that the appellee is entitled to prevail as a matter of law."

In an action under \$1983, a defendant moving for summary judgment has the burden of foreclosing all possibility that the plaintiff could prevail, and it is the burden of the moving party to "establish the absence of a genuine issue" and not upon the opposing party to raise same and "even if no opposing evidentiary matter is presented." Adickes, supra, 398 U.S. at 157,159,160, 90 S.Ct. at 1608,1609.

The foregoing standard of review is consistent with the elementary rules applicable to motion for summary judgments which the lower courts did not follow: the burden is upon the moving party to show absence of genuine issue, the inferences must be drawn in favor of opposing party, the evidence and legal theories must be viewed most favorably to opposing party and the court may not weigh conflicting

affidavits or inferences. 11/

8.2. <u>Application of Statutes Com-</u>
<u>pelling Respondent's Confis-</u>
cation Violates Petitioner's Freedom of

Speech. Respondent has conceded that

"Kodak adopted its policy [of confiscation] only to protect its own interest, solely because Kodak fears that returning the sexually explicit pictures it withholds might subject Kodak and/or its employees to the risk of being criminally prosecuted for violating constitutionally valid state and federal obscenity statutes." App. A-123.

"Kodak withholds... films and pictures... to protect Kodak and its employees from criminal charges and prosecution based on the very act of mailing or otherwise delivering the film and pictures to Kodak's customers.5/" App. A-111. (Respondent's N.5 identifies the statutes as \$\$1461-5 and \$311.2.)

The District Court stated that the state and federal statutes of which "Kodak

^{11/ &}quot;As the moving party, respondent had the burden of showing the absence of a genuine issue as to any material fact, and for these purposes the material it lodged must be viewed in the light most favorable to the opposing party." Adickes, supra, 398 U.S. at 157, 90 S.Ct. at 1608.

is concerned... track the decisions of the Supreme Court [and] are presumptively and probably valid." (App. A-40:12.) While the statutes may "track" and be "presumptively valid," this the application does not track and is not presumptively or otherwise valid. No case has yet suggested that the state (may absent a clear and present danger) interfere with free speech before publication, or ever, absent procedural due process which Petitioners have not received, and the authorities are clear that the state may not compel another to do what it could not do directly itself. Baldwin v. Morgan, 287 F.2d 750,756, (5th Cir. 1961) relied upon in Adickes, supra, 398 U.S. at 170-171, 90 S.Ct. at 1615. Respondent's assertedly compelled application of the statutes fails to "track", or comply with, the authorities in five separate respects: (1) prior restraint at pre-publication editorial stage is a unconstitutional, (2) pictures in prepublication form are not legally capable of being tested for obscenity, (3) Petitioners' magazine must be judged as a whole and not merely pictures therefrom, (4) the Respondent tests applied do not comport with the constitutional requirements and (5) Petitioners' have not been afforded the procedural due process required for censorship.

8.2.1. Censorship Limitations Prior Restraint.

"We must start from the recognition that the films were presumptively protected by the First Amendment. Roaden v. Kentucky, 413 U.S. 496, 93 S.Ct. 2796 (1973). Since seizure of First Amendment-protected materials constitutes a form of prior restraint, the materials are entitled to special treatment..." United States v. Tupler, 564 F.2d 1294,1297 (9th Cir. 1977).

Respondent's policy of confiscation directly affects and threatens Petitioners' freedom of speech and press by precluding its expression. This constitutes a prior restraint of speech, for which the Supreme Court has acknowledged a deep distaste and

which "comes to this Court bearing a heavy presumption against its constitutional validity."

Bantam Books, Inc. v.

Sullivan, 372 U.S. 58,70, 83 S.Ct. 631,639 (1963) 16/.

Application of the statutes to compel Respondent's confiscation subjects Petitioners' freedom of speech to "appraisal of facts, the exercise of judgment, and the formation of an opinion," factors which characterize censorship. 17/

^{16/} Later quoted in New York Times Company
v. U.S., 403 U.S. 713,714, 91 S.Ct.
2140,2141 (1971). See also Southeastern
Promotions, Ltd. v. Conrad, 420 U.S.
546,553-554 95 S.Ct. 1239,1244 (1975) and
Cantwell v. Connecticut, 310 U.S. 296, 60
S.Ct. 900 (1940).

^{17/} See Southeastern, N. 16 supra, 420 U.S. at 558-9, 95 S.Ct. at 1246-7, in which the Court additionally stated: "It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." Here the evidence shows that not only is it "difficult to know in advance what" Petitioners magazines will say or depict, it's impossible.

In Near v. State of Minnesota, 283 U.S. 697,721, 51 S.Ct. 625,633 (1931) the Supreme Court struck down a statute "authorizing suppression" of materials. Here application of the statutes according to Respondent requires it to suppress the transparencies. The Court there stated it was irrelevant whether restraint was directly by the legislature or only indirectly. In Near the asserted justification for the prior restraint was the injury suffered from libelous publications. In this case the alleged injury is the publication of obscenity. Substituting obscenity for libel, the rule to be drawn from Near is (bracketed portions representing such substitutions):

"The recognition of authority to impose previous restraint upon publication in order to protect the community against the circulation of [obscene matter] necessarily would carry with it the admission of the authority of the censor against which the constitutional barrier was erected. The preliminary freedom, by virtue of the very reason for its existence, does not depend, as this

court has said, on proof of [nonobscenity]. [citation.]

"Equally unavailing is the insistence that the statute is designed to prevent the circulation of [obscenity] which [is undesireable]. [T]he theory of the constitutional guarantee is that even a more serious public evil would be caused by authority to prevent publication."

The rule of Near applies in the case of disputes between private parties as it does in disputes between the government and a private party¹⁸, and freedom of speech and press applies to commercial as well as non-commercial speech. 19/

In <u>Southeastern</u>, N. 16 <u>supra</u>, this Court (420 U.S. at 552, 95 S.Ct. at 1243) declared the defendant's conduct was

^{18/} Organization For A Better Austin v. Keefe, 402 U.S. 415,418, 91 S.Ct. 1575, 1577 (1971) and Goldblum v. National Broadcasting Corp., 584 F.2nd 904,907 (9th Cir. 1979).

^{19/} New York Times Company v. Sullivan, 376 U.S. 254,256, 84 S.Ct. 710,713 (1964) and Quinn v. Aetna Life & Cas. Co., 616 F.2d 38 (2nd Cir. 1980).

unconstitutional <u>regardless</u> of whether the play was obscene. Once a prior restraint was found, the nature of the speech became insignificant.

8.2.2. Pre-Publication Material

Cannot Be Censored. titioners and Respondent agree that the film sent to Respondent by or for Petitioners is merely an early intermediate step in the process of Petitioners' publishing their magazines. (§5 above.) Respondent's threatened and actual confiscation of film directly intereferes with the Petitioners' editorial process and freedom of press by denying Petitioners films which they might use, and therefore, requires their use of other transparencies of inferior quality. Application of the statutes as asserted by Respondent requires it to enter the composing room of Petitioners to give directives as to the content of expression by Petitioners and to censor

Petitioners' speech. The law with respect

to such activity is well- stated in Goldblum, N. 18, supra, 584 F.2d at 907:

"It is a fundamental principle of the first amendment that the press may not be required to justify or defend what it prints or says until after the expression has taken place. The Government has been prohibited from interfering with the editorial process by entering the composing room to give directives as to the content of expression. The district court proceedings here intervened in the editorial process by ordering an official of the broadcasting company to produce a film just before its scheduled broadcast so that it could be examined for inaccuracies. A procedure thus aimed toward prepublication censorship is an inherent threat to expression, one that chills speech." (Emphasis added and citations omitted.)

Similarly in Pittsburgh Press Co.

v. Pittsburgh Com'n on Human Rel., 413

U.S. 376,390, 93 S.Ct. 2553,2561 (1973)

this Court stated:

"The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment."

Because of the assertedly compelled application of the statutes, Respondent

exercises "excessive caution" resulting in Petitioners loss of their freedom of speech. In <u>Baggett v. Bullitt</u>, 377 U.S. 360,372,84 S.Ct. 1316,1323 (1964) this Court struck down a statute creating a prior restraint because it forced "[t]hose... sensitive to the perils posed by [the statute to] avoid the risk... by restricting their conduct to that which is unquestionable safe. Free speech may not be so inhibited."

In reversing a \$311.2 conviction the court in <u>In Re Klor</u>, 64 Cal.2d 816,820,821 (1966) stated:

"Without the requirement that the defendant be shown to have prepared the material with intent to distribute it in its obscene form, the statute would apply to matter produced solely for the personal enjoyment of the creator or as a means for the improvement of his artistic technique. Such a statute would approach an interdiction of individual expression in violation of the First and Fourteenth Amendments. (See Griswold v. Connecticut (1965) 381 U.S. 479, 482 [85 S.Ct. 1678]; American Communications Assn. v. Douds (1950) 339 U.S. 382,412 [70 S.Ct. 674].)

"Nor does such conduct occur if the creator intends to purge the material of any objectionable element before distributing or exhibiting it. To hold otherwise would pose grave technical difficulties for the unconventional artist and would, because of the risk of criminal sanctions, tend to suppress experimental and tentative productions that might become, in finished form, constitutionally protected communication. [T]he Fourteenth Amendment requires that regulation by States of obscenity conform to procedures that will ensure against the of constitutionally curtailment protected expression, which is often separated from obscenity only by a dim and uncertain line.' (Bantam Books, Inc. v. Sullivan (1963) 372 U.S. 58,66 [83 S.Ct. 631].)"

8.2.3. Available Alternative Means of Publication Will

Not Save A Prior Restraint. The evidence shows a conflict as to whether alternatives are available to Petitioners. However, even were alternatives proved as a matter of law, it would not establish the absence of genuine issue of state action.

"Whether petitioner might have used some other, privately owned, theater in the city for the production is of

no consequence. There is reason to doubt on this record whether any other facility would have served as well as these, since none apparently had the seating capacity, acoustical features, stage equipment, and electrical service that the show required. Even if a privately owned forum had been available, that fact alone would not justify an otherwise impermissible prior restraint. '[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.' Schneider v. State 308 U.S., at 163, 60 S.Ct., at 151." Southeastern, supra, 420 U.S. at 556, 95 S.Ct. at 1245.

8.2.4. Must Consider Finished

Whole Magazine. Here Re-

spondent at best is judging pictures which may or may not be included in a magazine and is not considering the entire magazine, because of course it can't. Such application of a statute is unconstitutional.

"[A]ppellant would view each separate article and pictorial presentation, to determine whether each 'work' in a 'volume' is obscene under the Miller test. We conclude that decisions of both the Supreme Court and this court require us to treat each magazine as a separate work that is to be taken as a whole." Penthouse Intern., Ltd. v. McAuliffe, 610 F.2d 1353,1366-1367 (5th Cir. 1980).

If it is improper to view only entire articles, how much more so to view merely pictures from such articles.

In <u>United States v. Tupler</u>, N. 6, supra, the court stated:

"First Amendment standards require that any determination of obscenity be made considering the <u>material as</u> a whole...

"A single photographic print or 'out take' from a roll of motion picture film... could never establish probable cause to believe that the film 'taken as a whole, lacks serious literary, artistic, political, or scientific value.'" 564 F.2d at 1297. (Emphasis added.)

If a single "out take" cannot establish the obscenity of a motion picture, then surely a single picture which may never be used in a magazine cannot establish that the magazine "taken as a whole, lacks serious literary, artistic, political, or scientific value."

These cases follow the statements of Judge Hand in <u>U.S. v. One Book Entitled</u>

<u>Ulysses</u>, 72 F.2d 705,707 (2nd Cir. 1934)

holding that the publication must be "taken

as a whole".

8.2.5. Respondent's Policy Does

Not "Track". The standard for obscenity established in Miller
v. California, 413 U.S. 15,25, 93 S.Ct.
2607,2615 (1973) is a three-pronged test
including:

"(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."
413 U.S. at 25, 93 S.Ct. at 2615. (Emphasis added, citations omitted.)

As discussed under \$\$8.2.2. and 8.2.4. above, the transparencies are (if used at all) substantially altered prior to appearance in Petitioners' magazines. Textual material is also added. Respondent's assertedly compelled application of the statutes (Ex. 106-7) does not purport to consider the whole magazine, and thereby

fails to comply with prongs (a) and (c) of this conjunctive test. Nor does Respondent's policy require depiction in a "patently offensive way" so as to meet the second prong.

8.2.6. Procedural Due Process.

This Court has imposed a substantial set of due process requirements upon censors. 20/ Respondent has complied with none of them and Petitioners have been afforded none of the foregoing rights.

^{20/} See Freedman v. Maryland, 380 U.S. 51, 58-59, 85 S.Ct. 734,739 (1965); United States v. Thirty Seven (37) Photographs, 402 U.S. 363, 91 S.Ct. 1400 (1971); Blount v. Rizzi, 400 U.S. 410, 91 S.Ct. 423 (1971); Southeastern Promotions, supra, Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676,684-689, 88 S.Ct. 1298, 1303-1306 (1968). The basic due process requirements can be summarized as follows: (1) the standard for determining whether a work is obscene must comply with constitutional standards of obscenity and may not be vague, overly broad or imprecise; (2) the burden of proving that the work is unprotected expression must rest on the censor; (3) the censor, within a specified brief period, must either issue a license or go to court to restrain the use of the allegedly obscene material; (4) any restraint imposed in ad- (cont'd)

"There must be some judicial determination of obscenity <u>before</u> a seizure or 'constructive seizure' may occur." <u>Penthouse</u>, <u>supra</u>, 610 F.2d at 1359.

8.3. State Action Exists On Any

One of Three Basis. Respondent did not prove as a matter of law the absence of state action. Rather Petitioners demonstrated sufficient evidence to permit trial of the issue of state action on three separate basis: the "state compulsion test," the "public function test" and the "nexus test." (Lugar, supra, ____ U.S. at __, 102 S.Ct. at 2744,2755.)

8.3.1. <u>State Action Arises From</u>

Compulsion of Statutes.

We agree with Respondent that a showing of "significant governmental action and

^{20/ (}cont'd) vance of a final judicial determination on the merits must similarly be limited to the preservation of the status quo for the shortest fixed period compatible with sound judicial resolution; (5) the censorship procedure must also assure a prompt final judicial decision to minimize the deterent effect of an interim and possibly an erroneous denial of a license. Freedman, and Interstate Circuit, supra.

involvement" is required. (Ex. 82:9.) The evidence, however, demonstrates that not only was the government involved, it was the catalyst for Respondent's actions by compelling the same. (§5 above.) State action exists when a party is acting under compulsion of law. In Flagg Bros., Inc. v. Brooks, 436 U.S. 149,164, 98 S.Ct. 1729,1737 (1978) this Court stated:

"Our cases state 'that a state is responsible for the... act of a private party when the state, by its law, has compelled the act.' Adickes, 398 U.S. at 170, 90 S.Ct. at 1615."

This rule has been recognized by this Court in <u>Lugar</u>, <u>supra</u>, and adopted in <u>Adickes</u>, <u>Robinson</u> and <u>Peterson</u>, N.9, <u>supra</u>, and in <u>Doe v. Charleston Area Medical</u> <u>Center</u>, <u>Inc.</u>, 529 F.2d 638 (4th Cir. 1975).

In <u>Adickes</u>, the plaintiff sued to recover damages under \$1983 and this Court in reversing summary judgment for the defendant, stated (upper case being Court's emphasis):

"Although this Court has not explicitly decided the Fourteenth Amendment action issue,... underlying the Court's decisions in the sit-in cases is the notion that the State is responsible for the discriminatory act of a private party when the State, by its law, has compelled the act. As the Court said in Peterson v. City of Greenville, 373 U.S. (1963): 'When the state has commanded a particular result, it has saved to itself the power to determine that result and thereby 'to a 'become significant extent' has involved' in it'. Moreover, there support in lower much court opinions for the conclusion that discriminatory acts by private parties done under the compulsion of state law offend the Fourteenth Amendment. In Baldwin V. Morgan. supra, the Fifth Circuit held that '[t]he very act of posting and maintaining separate [waiting room] facilities when done by the [railroad| Terminal as commanded by these state orders is action by the state.' The Court then went on to say: 'As we have pointed out above the State may not use race or color as basis for distinction. TT MAY DO SO BY DIRECT ACTION OR THROUGH THE MEDIUM OF OTHERS WHO ARE UNDER STATE COMPULSION TO DO SO. ' ...

"For state action purposes it makes no difference of course, whether the racially discriminatory act by the private party is compelled by a statutory provision or by a custom having the force of law -- in either case it is the State that has

commanded the result by its law."
398 U.S. at 170-171, 90 S.Ct. at
1615. (Emphasis added.)

Respondent here claims that it is required to confiscate Petitioners' pictures to avoid criminal prosecution under \$311.2 and \$\$1461-5. What could be a clearer case of compulsion of law!

Respondent conclude that state action was not present? The lower courts concluded that the compulsion test did not apply because (1) the statutes were presumptively valid and (2) the compulsion test applied only in race discrimination cases, while Respondent further asserts that because its decision to confiscate pictures was not formulated at the request of law enforcement authorities its act is without the compulsion test. None of these assertions support their conclusion.

8.3.1.1. Subjective Motivation

Irrelevant. Once the compulsion of statute exists, the subjec-

tive motivation for Respondent's act becomes irrelevant. In discussing <u>Peterson</u>, <u>supra</u>, the court in <u>Robinson</u>, <u>supra</u>, stated:

"[A] Greenville ordinance which made it unlawful for restaurants to serve meals to white persons and colored persons in the same room or at the same table or counter. In Peterson the city argued that the manager's refusal to serve Negroes was based on his own personal preference, which did not amount to 'state action' forbidden by the Fourteenth Amendment. But we held that the case must be decided on the basis of what the ordinance required people to do, not on the basis of what the manager wanted to do. We said: 'when a state agency passes a law compelling persons to discriminate against other persons because of race, and the State's criminal processes are employed in a way which enforces the discrimination mandated by that law, such a palpable violation of the Fourteenth Amendment cannot be saved by attempting to separate the mental urges of the discriminators'". 378 U.S. at 155-156,84 S.Ct. at 1695. (Emphasis added.)

8.3.1.2. Compulsion Test Not

Restricted To Race

<u>Discrimination</u>. At App. A-38-39, the District Court stated that:

"[A] refusal to provide service and

to deal based on fear of prosecution under state law does not constitute state action... [T]he case here is not a race discrimination case, state action requirements are different in race discrimination cases than they are in other cases."

Respondent has acknowledged that the compulsion doctrine has been adopted by this Court as a basis for finding state action in cases involving racial discrimination. App. A-123.

Neither the lower courts nor Respondent has suggested any reason why an activity done under fear of criminal prosecution should constitute state action if the activity is racial discrimination but not constitute state action if the activity violates free speech.

The test has been specifically applied by the Fourth Circuit in <u>Doe v</u>. Charleston, supra, in a case not involving race discrimination. The plaintiff there sought declaratory and injunctive relief against a hospital for its refusing to allow the plaintiff's physician to perform

an abortion at the defendant's private hospital. The refusal was based upon a fear of criminal prosecution under a state law prohibiting abortion unless necessary to save the life of another. In finding "state action" for purposes of \$1983 the Court stated:

"It seems clear that the antiabortion hospital policy rests firmly upon what was thought to be the compulsion of state law. Thus the hospital acted 'under color of law'". 529 F.2d at 643-644.

The lower courts here (App. A-50:1-5) and Respondent acknowledge the inconsistency of their position with <u>Doe</u>, but conclude, without any logic or basis, that the Fourth Circuit is wrong.21/This clearly acknowledges a conflict in the Circuits. Additionally the conclusion flies in the face of statements by this

^{21/} Respondent's Brief to the Ninth Circuit at App. A-126 argued that "Doe is simply wrong" and during oral argument before the Ninth Circuit Respondent's counsel explicitly conceded that the Doe case was indistinguishable from this case.

Court in cases not involving race discrimination. In <u>Plagg</u>, §8.3.1, <u>supra</u>, this Court recited the test in a case <u>not</u> involving race discrimination (but found that the wrong alleged was not compelled). In <u>Lugar</u>, <u>supra</u> this Court in a case not involving race discrimination recited the test.

Admittedly other lower courts (see App. A-124) have by dicta asserted that different standards for state action applied in race discrimination cases, based upon the statement to that effect by Justice Brennan in his concurring and dissenting opinion in Adickes, supra. In N. 14 of Lugar, supra, ____ U.S. at ___, 102 S.Ct. at 2751 this Court stated:

"Justice Brennan's position [in Adickes] rested, at least in part, on a much less strict standard of what would constitute state action in the area of racial discrimination than that adopted by the majority. In any case, the position he articulated there has never been adopted by the Court."

The Ninth Circuit has ignored this

expression, and the matter should be settled by this Court, and uniformity between the Circuits established.

U.S. _____, 102 S.Ct. 2777,2786 (June 25, 1982), this Court in another case not involving race discrimination noted that if the act complained of had been commanded by the state "we would have a different question before us."

8.3.1.3. <u>Presumptive Validity</u> of Statutes Irrele-

vant. The reliance of the lower courts here upon the presumptive validity of the statutes is misplaced. First, as noted in \$8.2 above this application of the statutes is not presumptively valid. But, even were it presumptively valid, the validity has nothing to do with the presence or absence of state action.

Respondent (App. A-129) and the District Court (App. A-49:9) assert that a holding that state action arises by reason

of Respondent's acting to avoid criminal prosecution would place it in a dilemma. Neither Respondent nor the lower courts suggested why that dilemma is any greater for Respondent than it was for those who by reason of state law requiring same were following discriminatory practices in Adickes, Robinson, or Peterson, supra.

The contention that presumptive validity of the statutes and the asserted dilemma were responded to in <u>Lugar</u>, <u>supra</u>. In holding that state action did exist the court responded to similar concerns expressed in the dissenting opinion of Justice Powell and stated as follows:

"We thus find incomprehensible Justice Powell's statement that we cite no cases in which a private decision to invoke a presumptively valid state legal process has been held to be state action. Post at ____, 2761... [A] private party's invocation of a seemingly valid prejudgment remedy statute, coupled with the aid of a state official, satisfies the state action requirement of the Fourteenth Amendment and warrants relief against the private party." N.16, _____ U.S. at ____, 102 S.Ct. at 2752. (Emphasis added.)

"Justice Powell is concerned that private individuals who innocently make use of seemingly valid state laws would be responsible, if the law is subsequently held to be unconstitutional, for the consequences of their actions. In our view, however, this problem should be dealt with not by changing the character of the cause of action but by establishing an affirmative defense. A similar concern is at least partially responsible for the availability of a good faith, defense, or qualified immunity, to state officials. We not reach the question of the availability of such a defense to private individuals at this juncture. What we said in Adickes, 398 U.S. at 174, N. 44, 90 S.Ct. at 1617, when confronted with this question, is just as applicable today:

"'We intimate no views concerning the relief that might be appropriate if a violation is shown..." N. 23, U.S. at ____, 102 S.Ct. at 2757. (Emphasis added.)

8.3.1.4. Conclusion Re Compulsion. The inescapable

conclusion must be that Respondent's acts were compelled by the state, that the compulsion test does (or should now once and for all be declared to) apply to First Amendment cases, that there is no basis for limiting the compulsion test to race

discrimination cases, and that such compulsion here constitutes state action, or at a minimum genuine issues of fact were raised by Petitioners below which preclude summary judgment.

8.3.2. State Action Arises From Defendant's Exercise of

Censorship Function. One of the recognized bases for finding state action is that the act is one which has "traditionally been the function of the State."22/ Here Respondent acts as a censor in deciding which pictures it will return to the owners. (See nine separate affidavits

^{22/} Hall v. Garson, 430 F.2d 430,439 (5th Cir. 1970) [seizure of property to satisfy lien]; Marsh v. Alabama, 326 U.S. 501, 66 S.Ct. 276 (1946) [functions of town]; Terry v. Adams, 345 U.S. 461, 73 S.Ct. 809 (1953) and Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757 (1944) [primary elections]; North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 95 S.Ct. 719 (1975); Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983 (1972) and Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 460, 89 S.Ct. 1820 (1969) [enforcement of creditor remedies].

filed by Respondent commencing at Ex. $147.)\frac{23}{}$

Petitioners have contended that censorship has traditionally been a public function. Respondent has never disputed this principle and indeed appears to concur. $\frac{24}{}$

How then does Respondent contend that there is no genuine issue of fact on its censorship constituting state action? First, Respondent attempts to distinguish

^{23/} Respondent's assertion that it does not act as a censor (Ex. 87:22) is belied by the true facts. Respondent reviews the pictures and transparencies and decides which ones it will return to the owner thereof based on the content of the film and its evaluation of whether that content is or is not obscene. What else could be involved in censorship?

^{24/} At App. A-81 we noted that at Ex. 90:19 Respondent seemingly conceded that censorship has "traditionally been the function of the state". In response thereto Respondent discussed this test at App. A-127-130 and at no point disputed that censorship has been "historically a function of the state".

Marsh, supra on the basis that its "position would be analogous to the company town [in Marsh] only if it appeared that Kodak was an officially sanctioned censor..." (Ex. 89:8 and App. A-128). This is a strawman argument because Marsh did not hold (or premise its decision upon the basis) that the company town was officially sanctioned to bar the distribution of religious literature.

Secondly, Respondent claims an unsupported exception to the public function test because Respondent's practice does not totally bar Petitioners' publications. (Ex. 89:16 and App. A-128.) Available alternatives do not save infringement of free speech. (See \$8.2.3. above.)

Primarily, however, Respondent claims that the public function test is not applicable in private commercial transactions and supports this claim (App. A-126) by reading too literally (and

too much into) the dictum statement in Flagg, supra that:

"the field of private commercial transactions would be a particularly inappropriate area into which to expand" "the sovereign-function doctrine". 436 U.S. at 163, 98 S.Ct. 1737.

Respondent interprets statement to mean that the public-function doctrine is inapplicable in <u>all</u> private commercial transactions. We contend that is not how that statement should be interpreted and that it is not possibly what this Court intended. The actual decision in <u>Flagg</u> is as follows:

"Whatever the particular remedies available under New York law, we do not consider a more detailed description of them necessary to our conclusion that the settlement of disputes between debtors and creditors is not traditionally an exclusive public function." 436 U.S. at 161, 98 S.Ct. at 1736.

If (as Respondent argued) the public function test were never applicable in a private commercial transaction, there would have been no reason for Flagg to

have discussed specifically the settlement of disputes aspect thereof. $\frac{25}{}$

In Lugar, supra, this Court declared that state action justifying a claim under \$1983 was shown in connection with a private commercial transaction case. The court at page 2752-3 relied upon the same public function cases we have cited above and nowhere suggested their inapplicability to private commercial transactions. Other cases in which the test has been applied in a private commercial transaction include North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 95 S.Ct. 719 (1975); Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983 (1972); and Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 460, 89 S.Ct.

^{25/} Verification that the decision was limited to the dispute resolution aspect of private commercial transactions is found in footnote 12 where the court re-emphasizes that it is dealing with "dispute resolution between creditors and debtors".

1820 (1969).

But whether our analysis or that of Respondent is correct, surely the two literally inconsistent statements from Flagg are worthy of resolution by this Court.

8.3.3. State Action Arises from

Grants. Petitioners' evidence is that the unique superiority of Respondent's product is a result of its ownership of numerous patents and trademarks granted by the United States and the various States.

(Ex. 271-313.)26/ The third basis for state action is that the State and federal trademark and patent rights granted to Respondent cause sufficient governmental

^{26/} Although Respondent argued that alternative processors capable of equal product are available, Respondent neither offered evidence, nor argued, that other processors do in fact produce equal product or that its superiority is not attributable to patents and trademarks previously awarded to it.

involvement to amount to state action under the "nexus test" (\$1.1.3, above).

Whether such specific governmental involvement is sufficient to constitute state action has apparently never been decided in a published opinion. (Respondent concurs. App. A-122.) The distilled question is whether the granting of trademark and patent monopolies is more closely aligned with the leasing of public property and therefore state action is present (Burton v. Wilmington, 365 U.S. 715, 81 S.Ct. 856 (1960)) or to the corporate charter-license cases, and therefore state action is absent.

Respondent argues that "the mere grant of a corporate charter is a ministerial government act which does not...make the latter's business...'state action'." (Ex. 84:25, App. A-120.) Granting corporate charters may be ministerial but granting patents is not, and Respondent's attempted analogy to the

corporate charter cases is therefore improper.27/

The charter-license cases cited by Respondent are further inapplicable to trademarks and patents because unlike the former, the latter are the result of a direct grant of powers and rights pursuant

^{27/} The Patent Office officers perform more than ministerial acts in reviewing a patent application, in awarding rights and powers pursuant to the Constitution, and in entering into a contract with the patentee regarding the scope and exercise of these constitutional powers. Discretion and judgment is exercised by the officers of the Patent Office at every step in the patent procedure until such time as the bargain is struck with the patentee. See N. 18, App. A-79. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 95 S.Ct. 449 (1974), relied on by Respondent (App.A-121) is distinguishable first, because the Court in Jackson doubted that the state had ever granted or guaranteed the power Company a monopoly (419 U.S. at 352 95 S.Ct. 454), whereas the grant of a patent or trademark is clearly a grant of monopoly and secondly, because this Court there asserted that the governmentally created rights must have a close relationship to the challenged authority, a fact here true. The same distinction was drawn in Taylor v. St. Vincent's Hospital, 523 F.2d 75,77 (9th Cir. 1975) also relied upon by Respondent.

to the U.S. Constitution (Art. I, §8, cl.8), "are issued not for private benefit but for the public good" (Sears Roebuck & Co. v. Stiffel, Co., 376 U.S. 225,230, 84 S.Ct. 784,788 (1964)) and "in rewarding useful invention, the 'rights and welfare of the community must be fairly dealt with.'" (Griffith Rubber Mills v. Hoffar, 313 F.2d 1,3 (9th Cir. 1963)).

Absence Of Justiciable Controversy To Deprive Petitioners' Trial For Declaratory Relief. Respondent's position regarding the fourth count (Ex. 54:20) would force Petitioners to incur the enormous risks and injury which arise when Petitioners submit film to Respondent and then the transparencies are not returned, and to file repeated lawsuits seeking the mere return of these by then stale transparencies. Declaratory relief is the proper means of obtaining a definitive adjudication of rights, thereby avoiding

litigation each time a wrong is committed.

See Roe v. Wade, 410 U.S. 113,126, 93

S.Ct. 705,713 (1973). This case presents

a classic example of an action "capable of repetition, yet evading review". Roe, supra, 410 U.S. at 125, 93 S.Ct. at 713.

Under §8.2 above, we show that for several separate reasons the state could not engage in this prior restraint of free speech. If application of §§311.2 and 1461-5 requires Respondent to censor Petitioners' pictures, then the same does indirectly what the state cannot do directly and pursuant to Adickes (§8.3.1, supra) such application to a film processor must be declared unconstitutional.

8.4.1. There Is Justiciable

Case. The granting the summary judgment motion on the declaratory relief (28 U.S.C. §2201) count was based on the conclusion that "there is no case or controversy" (App. A-41:19) but rather

this was "a collusive action" (App. A-42:5) because "Respondent tells us it has no interest in upholding either set of laws" (App. A-41:25). The authorities cited not only by Respondent, but also by the District Court, as support for reaching this conclusion as a matter of law are inapplicable in that each is premised on a finding of a collusive action or moot case, and this case is neither .28/ There is surely not one shred of evidence or argument by Respondent that it joins, or is in collusion, with Petitioners in their attack on the validity of the application of the laws here in question. To the contrary, Respondent's Answer and Motion for Summary Judgment prove adversity.

Z8/ Typical is the statement from Moore v. Charlotte-Mecklenburg Board of Education, 402 U.S. 47,48, 91 S.Ct. 1292,1293 (1971) quoted in Respondent's moving papers (Ex. 94:28) that "We are thus confronted with the anomaly that both litigants desire precisely the same result...".

Avoidance of collusion is assured by 28 U.S.C. \$2403. The District Court's conclusion that as a matter of law this would be "a collusive action" is in error. 29/ If Respondent had no interest

In Ruotolo, supra, a creditor moved to disqualify a retired bankruptcy referee from serving as attorney for the debtor in possession. After denial of the motion the government intervened, following which the creditor withdrew its objection, and the retired referee ceased to represent the debtor. Nonetheless the government appealed the denial of the disqualification motion. The Court of Appeals held that the matter had become moot and that there remained no justiciable issue by reason thereof. Further the Court found that for the government to proceed it had to have an independent basis, and that once the parties had resolved their differences, the government had no such basis, and further that its decision would merely be an advisory opinion. None of the facts in Ruotolo are even tangently similar (cont'd)

^{29/} The District Court relied upon U.S. v. Johnson, 319 U.S. 302, 63 S.Ct. 1075 (1943) and Rutolo v. Rutolo, 572 F.2d 336 (1st Cir. 1978). (Ex. 393:24.) In Johnson the landlord defended a tenant's action on the ground that the Emergency Price Control Act of 1942 was unconstitutional, and the Supreme Court upheld the government's claim of collusion in a motion to reopen the case. 28 U.S.C. §2403 protects against this risk, and there is no evidence of collusion here.

in defending the constitutionality of the statutes and if all it wanted to do was be secure against possible prosecution, why did it answer the fourth count?30/

^{29/ (}cont'd) to those here and the decision in no way supports a conclusion that there is not a dispute requiring declaratory relief in this case.

^{30/} The other authorities cited by Respondent are equally inapplicable. In Golden v. Zwickler, 394 U.S. 103, 89 S.Ct. 956 (1969), the Supreme Court found that the case or controversy had become moot. In Mendez v. Heller, 530 F.2d. 457 (2d Cir. 1976), the plaintiff sought to challenge a New York two-year residency requirement prior to actually having attempted to file for divorce in the appropriate New York State Courts. The courts are more ready to review threatened deprivations of First Amendment Rights than in other situations. Zwickler v. Koota, 389 U.S. 241,254, 88 S.Ct. 391,399 (1967); Wolff V. Selective Service Local Board No. 16, 372 F.2d 817 (2nd Cir. 1967). In contrast to the situation in Mendez, all possible events have occurred to create an actual dispute between the parties. Plaintiffs have tendered film for processing to defendant and defendant has refused to return the films to Plaintiffs. Thus, the "exigent adversity" mentioned in Mendez exists. Finally, the contention that Granfield v. Catholic University of America, 530 F.2d 1035 (D.C. Cir. 1976) requires the joinder of representatives of the bodies enacting the statutes is in error as demonstrated by other cases cited by Respondent itself.

Here Respondent complains that it engages in censorship and confiscation because the law commands it to do so. An action to recover stale pictures is worthless. Yet the lower courts would place Petitioners in a position where they have no meaningful remedy. Petitioners have no basis for suing the state or federal governments because Petitioners have no information that the governments ever intended the statutes to be applied as Respondent claims they are compelled to apply them. If in addition Respondents are free from attack because they are only following the $law \frac{31}{2}$, then some remedy must be available to Petitioners to stop

^{31/} Respondent's contention (App. A-129) that prosecution of a film lab employee has already been determined as proper based upon Gold v. United States, 378 F.2d 588 (9th Cir. 1967) is in error. The participation by the defendant in Gold was far more then merely returning developed film. Additionally the film in Gold was a completed motion picture, not merely an intermediate step in the publication of a magazine.

the unconstitutional application of these statutes and declaratory relief is that remedy.

8.5. Plaintiffs Did Not Waive Claims. At App. A-116 Respondent argued that it is not obligated to return material depicting matters described in its notice because that notice constituted part of a contract between defendant and plaintiffs. There in N. 6 Respondent concedes that the District Court did not so find. We therefore do not discuss same except to note that at App. A-99-102 we demonstrate that Respondent's position is unsound for a number of reasons including that Petitioners did not agree to Respondent's policy, there is no waiver from Respondent's unilateral notice, Respondent's notice at most is a contract of adhesion and is not enforceable, and First Amendment rights are not waivable.

> 8.6. Motion Premature. Summary judgment should not be grant-

ed until such time as the party opposing the motion has had an adequate opportunity to conduct discovery.32/ The foregoing rule is particularly true in situations where the facts necessary to oppose the motion are in the possession of the moving party, and here Respondent asserts its subjective intent is a material issue. Respondent's motion herein was made within a few days after counsel for the parties first met to discuss discovery and before any discovery had been taken. Thus, Respondent's motion was premature, and should therefore have been denied.

> CONCLUSION - RELIEF REQUESTED. By reason of application of certain

^{32/} Rule 56(f) of the Federal Rules of Civil Procedure. See also Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 96 S.Ct. 1848 (1976); Poller v. Columbia Broadcasting System, Inc. 368 U.S. 464, 82 S.Ct. 486 7 L.Ed. 2d 458 (1962); Timberlane Lumber Co. v. Bank of America N.T.S.&A. 549 F.2d 597 (9th Cir. 1976); Illinois State Employees Union Council 34 Etc. v. Lewis 473 F.2d 561,565 n.8 (7th Cir. 1972).

statutes Respondent has injected itself into the editorial process of Petitioners' publications, as a censor. Respondent's power to influence Petitioners arises by virtue of trademark and patent grants. An absence of State action cannot be declared as a matter of law. This application of the statutes, improperly places at risk those uninvolved with the publication itself resulting in Respondent's redefining obscenity in a manner never approved by any court, setting itself up as a censor to review, without any court intervention, the content of proposed photographs, and confiscating those photographs it deems obscene. Pursuing a declaration of the unconstitutionality of such application must be permitted. Petitioners cannot be relegated to a valueless common law action for return of stale pictures when it is the very existence of these laws whose application violates Petitioners' freedom of speech and press. While we contend the

state action element has been proved as a matter of law, we need only show that the District Court's decision that as a matter of law there is an <u>absence</u> of state action, is in error.

We pray that this Court grant this Petition so that it may resolve the conflicting decision between the circuits and settle important federal questions not heretofore resolved.

Respectfully submitted,

RICHARD D. AGAY for COOPER, EPSTEIN & HUREWITZ, APC Attorneys for Petitioners

(Excerpts under separate cover)

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No.

Office Supreme Court, U.S., F. I. L. E. D.

MAR 19 1983

ALEXANDER L. STEVAS,

SUPREME COURT OF THE UNITED STATES CLERK

October Term, 1982

HUSTLER MAGAZINE, INC., a corporation, and CHIC MAGAZINE, INC., a corporation,

Petitioners,

VS.

EASTMAN KODAK COMPANY, a corporation,

Respondent.

WRIT OF CERTIORARI
To The United States Court Of Appeals
For The Ninth Circuit

APPENDIX A TO PETITION FOR WRIT OF CERTIORARI

RICHARD D. AGAY
COOPER, EPSTEIN & HUREWITZ
A Professional Corporation
9465 Wilshire Blvd., Suite 800
Beverly Hills, California 90212
(213) 278-1111

Attorneys for Petitioners

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IN THE UNITED STATES COURT OF APPEALS SEP 1 6 ECC

FOR THE NINTH CIRCUIT

PHILLIP S. COLLEGE

HUSTLER MAGAZINE, Inc., a corporation and CHIC MAGAZINE, Inc., a corporation,

Plaintiffs-Appellants,

) Nos. 80-5861/6077) D.C.# CV 80-561-IH

ORDER

EASTMAN KODAK COMPANY, a corporation,

v.

Defendant-Appellee.

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DEP 20 1982

COOPER, EPSTEIN & HUREWITZ

Appeal from the United States District Court for the Central District of California Irving Hill, District Judge, Presiding Argued and submitted September 10, 1982

Before: WRIGHT, TANG, and SCHROEDER, Circuit Judges.

We affirm the grant of summary judgment for the reasons announced by the district court.

IN THE UNITED STATES COURT OF APPEALS OV 15 1982

HUSTLER MAGAZINE, Inc., a corporation and CHIC MAGAZINE, Inc., a corporation,

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v .

Nos. 80-5861/6077 D.C.# CV 80-561-IH ORDER

Plaintiffs-Appellants,

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EASTMAN KODAK COMPANY, a corporation, Defendant-Appellee.

NOV 17 1982

Before: WRIGHT, TANG, and SCHROEDER, Circuit Judges.

A majority of the panel as constituted above has voted to deny the petition for reheating and to reject the suggestion for reheating en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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JOHN R. McDONOUGH J. STEVEN GREENFELD

BALL, HUNT, HART, BROWN AND BAERWITZ 450 North Roxbury Drive, Suite 500

Beverly Hills, California 90210

(213) 278-1960 LODGED

18 1980 FILED

Attorneys for Defendant

COCT SEP 28 1980

CLERK U.S. DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA CLITTAL DISTRICT OF CALIFORNIA DEPUTY

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Cital U S U.S. R. L. C. J. CENTRAL CISTING! OF CALADATA 84

HUSTLER MAGAZINE, INC., a corporation, and CHIC MAGAZINE, INC., a corporation,

Plaintiffs,

VS.

EASTMAN KODAK COMPANY, a corporation,

Defendant.

CIVIL ACTION NO. 80 00561 IH

JUDGMENT

There came before the Court for hearing on September 22, 1980, a motion by Defendant filed June 30, 1980, denominated as a motion for summary judgment. The Court announced that the motion would be considered in some respects as a motion to dismiss and in other respects as a summary judgment motion. Appearances were: for Defendant-moving party, Ball, Hunt, Hart, Brown and Baerwitz by John R. McDonough, Esq. and J. Steven Greenfeld, Esq. For Plaintiffs-respondents, Cooper, Epstein & Hurewitz by Richard Agay, Esq.

The Court having heard argument and having considered the evidence, Points and Authorities and other documents filed in support of said motion and in opposition thereto, on September 29, 1980 made its "Order Granting Motion to Dismiss as to Count One and Granting Partial Judgment, Summary Judgment, as to Counts Two, Three and Four." In said Order, the Court (1) granted Defendant's motion, as a motion to dismiss, with respect to Count 1 of the complaint and gave Plaintiffs until October 2, 1980 to file an amended complaint stating in separate counts the causes of action under \$1 and \$2 of the Sherman Act, with detailed allegations of harm and (2) granted Defendant's motion for summary judgment as to Counts 2, 3 and 4 of the complaint. Plaintiffs did not file an amended complaint by October 2, 1980 nor have they filed such a complaint to the date of this judgment.

In light of the foregoing, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

 Count 1 of the complaint is hereby dismissed, with prejudice, and Plaintiffs Hustler Magazine, Inc. and Chic Magazine, Inc. shall take nothing thereby against Defendant Eastman Kodak Company.

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- 2. Plaintiffs Hustler Magazine, Inc. and Chic Magazine, Inc. shall take nothing and Defendant Eastman Kodak Company is hereby granted judgment against Plaintiffs in respect of Counts 2, 3 and 4 of the complaint.
 - 3. Each side shall bear its own costs.

DATED: October /4, 1980

THIR PPT

TRVING HILL, Judge United States District Court

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CENTRAL DISTRICT OF CALEGRIA

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OCT - 2 1980

COOPER, EPSTEIN & HUREWITZ

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HUSTLER MAGAZINE, INC., a corporation, et al,

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V.

Plaintiff.

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EASTMAN KODAK COMPANY, a corporation,

Defendant.

NO. CV 80-561-IH

ORDER GRANTING MOTION TO DISMISS AS TO COUNT ONE AND GRANTING PARTIAL JUDGMENT, SUMMARY JUDGMENT, AS TO COUNTS TWO, THREE AND FOUR

There came before the Court for hearing on September 22, 1980, a motion by Defendant filed June 30, 1980, denominated as a motion for summary judgment. The Court announced that the motion would be considered in some respects as a motion to dismiss and in other respects as a summary judgment motion. Appearances were: for Defendant-moving party, Ball, Hunt, Hart, Brown and Baerwitz by John R.

McDonough, Esq. For Plaintiffs-respondents, Cooper, Epstein & Hurewitz by Alan Isaacman, Esq.

The Court having heard argument and having considered the evidence, Points and Authorities and other documents

- 1. As to Count 1, which incorporates causes of action under Sections 1 and 2 of the Sherman Act, the motion is granted as a motion to dismiss. Plaintiffs are given until October 2, 1980, to file an amended complaint stating in separate counts the causes of action under Section 1 and Section 2 of the Sherman Act with detailed allegations of harm.
- 2. As to the second and third causes of action,
 Defendant's motion is granted. The Court finds that there
 is no bona fide dispute of material fact and that Defendant
 is entitled to judgment as a matter of law. As to the
 second and third causes of action, Plaintiffs Hustler Magazine,
 Inc. and Chic Magazine, Inc. shall taking nothing by their
 action and Defendant Eastman Kodak Company shall have judgment
 against Plaintiffs.
- 3. As to Count four, Defendant's motion is granted. The Court finds that there is no bona fide dispute of material fact and that Defendant is entitled to judgment as a matter of law. As to the fourth cause of action, Plaintiffs Hustler Magazine, Inc. and Chic Magazine, Inc. shall taking nothing by their action and Defendant Eastman Kodak Company shall have judgment against Plaintiffs.
- 4. The Court's further findings of fact and conclusions of law and a statement of its reasons are contained in a transcript of the proceedings in open court on September 22, 1980, which transcript is ORDERED filed upon its

preparation. In the event of any appeal as to any of the matters decided on September 22, 1980, the appellant shall furnish a copy of said transcript as a part of the record to the Court of Appeal.

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- 5. As to any summary judgment granted herein, each side shall bear its own costs.
- 6. The Clerk shall transmit a copy of this Order by United States mail to counsel for both sides.

DATED: September 29, 1980.

IRVING HILL, Judge United States District Court

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

	CASE NUMBER					
lustler Magazine	PLAINTIFF(S)	CV 80-5%1-IH				
vs astman Kodak Co.	DEFENDANT(S)	NOTICE OF ENTRY				

TO THE ABOVE NAMED PARTIES AND TO THEIR ATTORNEY(S) OF RECORD:

	You are	here	by no	tified	that _	Orde	er gra	anting m	otion	to	dismi	SS
to cou	nt one	and	gran	nting	partia	l ju	dgment	, summa	ry ju	ıdgm	ent, as	to
counts	two, th	ree	and	four								_
						in the	above	entitled	case	was	entered	in
the doc	ket on	9-	30-8	30								

You are also notified that if this case was tried and you introduced exhibits into evidence, they must be claimed at this office after the expiration of thirty days from the receipt of this notice. (After sixty days in cases in which the United States, its officers or agencies were parties) Unless they are claimed within thirty days after the expiration of the above period, they will be destroyed pursuant to Local Rule 20(a). If an appeal is taken they will of course, be held until the Appellate Court finally determines the matter. Exhibits which are attached to a pleading will not be destroyed but will remain as a permanent record in the case file.

(over)

Civ 26 (10/78)

NOTICE OF ENTRY

CERTIFICATE OF MAILING

I, Edward M.	Kritzman, Clerk, United	States District Court,
Central District of	California, and not a party t	to the within action, hereby
certify that on	9-30-80	, I served a true
copy of this notice	of entry on the parties in th	ne within action by depositing
true copies thereof,	enclosed in sealed envelopes	, in the United States Mail
in the United States	Post Office mail box at Los	Angeles, California, addressed
as follows:		

Bali, Hunt Hart & Brown 450 N. Roxbury Dr. Beverly Hills, Calif. 90210

Cooper, Epstein & Hurewitz 9465 Wilshire Blvd. Beverly Hills, Calif, 90212

EDWARD M. KRITZMAN, CLERK

Carmen M. Seorge

NOTICE

IN ACTIONS ARISING UNDER THE ECONOMIC STABILIZATION ACT, THE EMERGENCY PETROLEUM ALLOCATION ACT, AND THE ENERGY POLICY AND CONSERVATION ACT, NOTICES OF APPEAL TAKEN FROM THIS JUDGMENT MUST BE FILED IN THE TEMPORARY EMERGENCY COURT OF APPEALS IN ACCORDANCE WITH THE RULES OF PROCEDURE OF THAT COURT.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HONORABLE IRVING HILL, CHIEF JUDGE PRESIDING

HUSTLER MAGAZINE, INC., et al.,

Plaintiffs,

V.

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EASTMAN KODAK COMPANY,

Defendant.

COPY

CV 80-561-IH

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Monday, September 22, 1980

XAVIER MIRELES, CSR Federal Court Reporter 419 U.S. Courthouse 312 North Spring Street Los Angeles, California 90012

Appearances:

For the Plaintiff Hustler:

COOPER, ESPTEIN & HUREWITZ
BY: RICHARD D. AGAY
VICTOR VITLIN
9465 Wilshire Boulevard, 800
Beverly Hills, California 90212

For the Defendant:

BALL, HUNT, HART, BROWN & BAERWITZ
BY: JOHN R. McDONOUGH
J. STEVEN GREENFELD
450 North Roxbury Drive
Beverly Hills, California 90210

LOS ANGELES, CALIFORNIA; MONDAY, SEPTEMBER 22, 1980; 3:00 P.M.

THE COURT: Good afternoon, gentlemen.

Call the case, Mr. Clerk, but let me get my calendar in shape here first.

Go ahead.

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THE CLERK: Item 8, CV 80-0561-IH: Hustler Magazine, Inc., et al., v. Eastman Kodak Company.

Counsel, announce your appearances, for the plaintiff first.

MR. AGAY: Richard D. Agay and Victor Vitlin, of Cooper, Epstein & Hurewitz.

THE COURT: Which of you gentlemen will handle the argument?

MR. AGAY: I will, Mr. Agay, your Honor.

THE COURT: All right.

MR. McDONOUGH: John R. McDonough and Steven Greenfeld for the defendant Eastman Kodak Company.

THE COURT: Are you going to handle it, Mr. McDonough?

MR. McDONOUGH: Yes, I will, your Honor.

THE COURT: Okay. In this case, plaintiffs are publishers of two national magazines, Hustler and Chic.

They sue defendant Eastman Kodak under the antitrust laws and various Civil Rights and constitutional provisions of law.

They allege Eastman refuses to process and deliver

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color film which the magazines have given to Eastman for processing and delivery.

Somewhere in the papers, a little is made that the film is owned by the magazines who give the film to photographers; and I don't know whether these photographers are employees or independent contractors. The photographers take the pictures, and the photographers go to Eastman for development of the film and apparently printing the film, and give Eastman Kodak the film under their own names, meaning the photographer's name; is that right, Mr. Agay?

MR. AGAY: Yes, your Honor.

Although there are also instances where the film is given to Kodak under the company name. I don't think any of these particular films were given under the company name.

THE COURT: And those photographers are, in your view, what? employees? or independent contractors?

MR. AGAY: They would be independent contractors, but the film as we alleged remains ours at all times.

THE COURT: Okay. The motion before me filed June 30 is denominated as a Motion for Summary Judgment.

In some aspects where facts are not involved, it could have been brought and denominated as well as a motion to dismiss. It might be that in my discussion of the various aspects of the motion, some aspects will be treated

as a motion to dismiss; and I will try to delineate such aspects as I get to them; but there is no doubt that in many aspects, this is a true summary judgment motion; so I want to follow my normal practice of listing the evidence to make sure I have not overlooked any.

The evidence for the defendant moving party is as follows: We have an affidavit from Mr. McClasky; a declaration of Mr. Fisher in Eastman Kodak Customer Service; an affidavit of Mr. Allenger; an affidavit of Mr. Shock; a declaration of Mr. Stephenson.

Defendants have filed copies of plaintiffs' magazines, at least one copy of each.

We have a group of affidavits from some of the defendants' laboratory managers saying that they can't find any film belonging to Hustler or Chic that has been retained by Eastman.

On this small subject, there may well be a conflict of material fact because the magazines -- the plaintiff says that film belonging to the magazines has been retained by Eastman, and Eastman responds by saying that they cannot find the film under the photographers' names.

So I think we have a conflict of fact, but that conflict is irrelevant to the issues that are raised by this motion.

I am going to assume for the purpose of all issues

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that are discussed and decided today that defendant Eastman, as alleged, has retained and refused to deliver the processed version of the films that plaintiff has left them, with Eastman, for developing, and has refused to return even the negatives.

Now, let me check with you, Mr. McDonough, have you listed all the evidence?

MR. McDONOUGH: Yes, I have, your Honor.

And we accept that assumption that the film belongs to them.

THE COURT: Very good.

Now, for the plaintiffs respondents, I have the following evidence: A declaration of the Vice-President, Mr. Faer, F-a-e-r; and an affidavit of Mr. DiMarco, one of the photographers.

MR. AGAY: Excuse me, your Honor. He was not one of the photographers. He was Production Chief, I believe it was.

THE COURT: He is not a photographer?

MR. AGAY: No. He is a former employee.

THE COURT: Former what? production chief?

MR. AGAY: May I look at his affidavit?

THE COURT: Sure. I don't mind.

I thought I had it right.

MR. AGAY: I'm sorry.

THE COURT: He says, "I worked as an Assistant Photographer."

MR. AGAY: That was during this period; then it says, "Thereafter, I went to work for Hustler Magazine," and I don't know exactly what his title was.

I think there is an affidavit by the plaintiffs which attributes a title to him.

THE COURT: Well, if you look at the first paragraph, you will see what threw me off.

MR. AGAY: Yes. It is ill-organized.

THE COURT: He doesn't tell who he worked as an Assistant Photographer for.

MR. AGAY: Right.

THE COURT: Do you think he did not work for Hustler as an Assistant Photographer?

MR. AGAY: I know he didn't. I am just trying to figure out exactly what his title was, but I know that it wasn't an Assistant Photographer.

THE COURT: All right. Let's not characterize it by title.

Continuing: After DiMarco, we have a declaration of Mr. Elia, who was the Photo Director.

We have a declaration of Mr. Clatt, C-l-a-t-t, another photographer; declaration of Mr. Baes, another photographer.

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Is that all the evidence, Mr. Agay? MR. AGAY: Yes, your Honor.

THE COURT: All right. Now, before I get to this, I note that there is now going on in state court an action between the same parties; and I gather that means it is brought by both magazines, Hustler and Chic, to get their negatives and/or developed pictures back.

The action is in the nature of conversion and replevin.

I know the number of the case. You furnished that to me. It is LASC case No. C 313377. I do not know the title of that case. I assume that it was filed before the federal court case was filed.

Can you straighten me out on those matters? MR. AGAY: As to the title, it would be identical except there would be some DOES added to the defendant list.

THE COURT: So it's Hustler Magazine and Chic Magazine v. Eastman?

MR. AGAY: Right.

And as to the date of the filing, I don't have that with me, but I would suspect that it was filed about the very same day.

THE COURT: Very well. All right.

I note that action because it seems to me that it will necessarily involve many of the contract issues

involved in this federal case and may set up a collateral estoppel or res judicata bar.

All of this is principally stated. I now want to return to what I believe are the problems that are posed by this motion.

I think the motion poses problems that break down into four subdivisions; and the first is the Sherman Act, Section 1. That is included in the First Cause of Action, although the First Cause of Action is broader than the Sherman one alone.

The second problem is the Sherman Act, Section 2, which is always part of the First Cause of Action.

The third problem is the question of the State action as involved in Causes of Action 2 and 3; and the fourth problem is the declaratory judgment prayer set up as a separate Cause of Action in Cause of Action No. 4.

Those are the subdivisions as they appear to me.

I will discuss them separately, hear argument on each after

I have indicated my tentative decision.

Let's go right to Sherman, Section 1.

Section 1 of the Sherman Act makes unlawful any contract, combination, or conspiracy in restraint of trade.

So far as I can see, this case involves no combination and no conspiracy. None can be alleged, and none has been alleged; so we are left with the question of contract. In a minute, I am going to ask you, Mr. Agay, to outline the nature of the alleged contract; but before I do, I want to say one thing on a different subject.

The defendant has contended that there can be no Section 1 liability unless there is what defendant calls a multiplicity of actors on the defense side of the case.

I think the defendant relies here on some language in the Supreme Court that was, when it was uttered, less than careful on the part of the court, and that the court is against this contention.

I believe a single actor can violate Section 1.

There has to be a contract between actor and the plaintiff or someone else of which the plaintiff can take advantage, but there is no requirement under Section 1, as I understand the law, for a multiplicity of actors.

Mr. Agay, come up now, if you don't mind, and describe to me the essentials of the contract that you think exists between plaintiffs and Eastman that give you an access to Section 1 of Sherman.

MR. AGAY: I don't believe there is a contract between the plaintiffs and Eastman Kodak that gives rise to a Section 1 claim. The contracts to which we refer are contracts that Eastman Kodak makes with others.

We are not sure of exactly who all of those others are THE COURT: What others?

MR. AGAY: Developers. Other developers, competitors.

THE COURT: You mean other people who give them

film to develop?

MR. AGAY: No. No. No. Other laboratories who are working under license agreements granted by Kodak.

THE COURT: Oh, you lost me. I don't see any sign of that in the Complaint. Is that in there?

MR. AGAY: I was trying to find the exact portion, your Honor. I am not certain that it is well pleaded.

THE COURT: I may have missed this. This comes to me, not only as a startling thing, but also almost shocking.

Let me turn to the Complaint, and let's see if there is even an intimation of that in here.

Hold on. Hold on.

All right. The Complaint was filed February 13. I have it.

First Cause of Action is Sherman I. Where is that?

MR. AGAY: I may have been overly restrictive.

There is a contract conceivably -- never mind. I am sorry,
your Honor.

I don't think -- I confess, I don't believe the Complaint is well pleaded for that particular element.

I think that --

it --

THE COURT: If I gave you the opportunity to replead

 MR. AGAY: Your Honor, if I could just --

THE COURT: Hold on one second.

Describe the contract you would rely upon, and how it violates Section 1 of Sherman, and the way it gives you rights.

MR. AGAY: The contract or contracts between defendant and competing laboratories by virtue of which they obtain chemicals and/or licensing of equipment upon which Kodak has a patent restricts our ability -- that is, plaintiffs' ability -- to obtain quality pictures.

THE COURT: Well, I know that under Section 2 of
Sherman you contend that Eastman has uniquely the best service
so that you are deprived of that service. You ought to make
that a separate market. We will get to that.

Let me have this other again, the contract.

MR. AGAY: We have not, of course, conducted any discovery, but we believe that each one of these competitors operates to the extent --

THE COURT: Now, "competitors" are people who also develop color film for the public; is that right?

MR. AGAY: Right.

THE COURT: Go ahead.

MR. AGAY: They operate to the extent they develop Kodachrome color film through the patents and licenses of the patent -- granted the licenses that is granted by Kodak.

1 THE COURT: Just Kodachrome? not Ektachrome? 2 MR. AGAY: It doesn't make any difference what 3 but Kodachrome is the only film that we are involved with 4 that case. 5 Those contracts we believe are contracts that w. 6 violative of Section 1. It is to those contracts that we 7 refer. 8 I should say: Those are the contracts that we 9 would refer. 10 THE COURT: These are contracts with other phot 11 finishing laboratories that somehow that restricts them is 12 some fashion? 13 MR. AGAY: Yes, your Honor. 14 THE COURT: To what effect does that restrict the 15 What happens? How do you get to the Complaint about that 16 MR. AGAY: The effect is that we are unable to 17 pictures developed by others of equal or acceptable quali-18 THE COURT: That is the same monopolization cha: 19 that you made under Section 2, isn't it? 20 MR. AGAY: Right. The damage is the same. The 21 charge is different. 22 THE COURT: We are going to take a brief recess 23 (Brief recess.) 24 THE COURT: Mr. McDonough, would you come to the

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MR. McDONOUGH: Yes, sir, your Honor.

THE COURT: Were you as surprised as I at the dimensions of the Sherman 1 claim, or did you understand that was the Sherman 1 claim?

MR. McDONOUGH: No. I have to confess that I was equally surprised, your Honor; and it seems to me that counsel has really acknowledged that we both should have been surprised. He has said that it was not well pleaded. As I understand him, he said that, given the opportunity, he would allege the existence of some agreements which he says may exist between Kodak and some other laboratories. He doesn't apparently have a shred of evidence in his hands or in his possession that any such agreements do exist. He hasn't, apparently, made any investigation or asked anybody whether they do exist; and what I think he is asking this court to let him do is this: To allege that they do exist and engage in a large program of discovery to see if he can turn up out of our files or somebody else's some such agreement, and I don't believe that it was anywhere signaled in his Complaint as originally filed so that it is --

THE COURT: That is a problem that neither side addresses in its briefing.

The Ninth Circuit, my bosses, are reasonably liberal in stating that even though certain theories of action are not even hinted at in the Complaint, before you grant judgment,

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you have to give some opportunity for amendment.

Now, whether that would apply to a case like this, I don't know. We have here a mixup in one Cause of Action, Section 1 of Sherman and Section 2 of Sherman, and the only language about denying competing laboratories access to anything is in the paragraph that deals with Section 2 of the Sherman Act with the monopolization paragraphs.

Now, counsel has conceded -- first, the court has ruled there is no combination and what?

MR. McDONOUGH: Conspiracy, your Honor.

THE COURT: Conspiracy.

Counsel has conceded that there is no contract upon which he relies on between the defendant and plaintiffs.

MR. AGAY: There is no contract, but there is an agreement which I believe amounts to the same thing.

THE COURT: An "attempted contract" is a word -that is a group of words I never heard about.

MR. AGAY: It is something which the defendants claim to be a contract; to wit, the, quote, Exhibit A; their exhibit in which they set forth the conditions under which they will accept film.

THE COURT: You have to be specific, and you just can't keep backing and filling in a situation like this.

Do you allege a contract between either/or both plaintiffs and Eastman, or not?

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MR. AGAY: No. We believe that that contract was never entered into, but they have told us that they would not deal except under those terms.

I think that that amounts to the same thing for the purposes of Section 1.

THE COURT: Let me find out if there is any contract.

Have you got any case that says that a contract, which is a word of art -- you all know what it means.

You learned it in the first semester of law school, whether it be an offer and acceptance, or an unilateral contract; without a contract, what makes you think you have a Section 1 claim?

MR. AGAY: I don't have it at my fingertips, but I believe what the case says is that you don't need a plurality of actors. It involved cases where an attempt was made to impose certain conditions upon the plaintiff, who rejected those conditions; and the claim was that this was the contract.

THE COURT: Let's hear what those are. Cite them. Discuss them with me.

MR. AGAY: I believe Parke Davis was one of those which was cited in our brief, I believe. If you would give me a second to find the pages.

THE COURT: Is Parke Davis a Section 1 case?

MR. AGAY: I believe so, your Honor.

THE COURT: But does it go off on this question?

MR. McDONOUGH: In those cases, your Honor, there was an allegation that Parke Davis contracted with some of its customers to restrict competition in the business.

THE COURT: Those others could complain of that?

MR. McDONOUGH: Yes, that one was damaged by the contractual arrangements between Parke Davis.

Those, as I recall it, were re same-price-maintenance agreements or agreements to divide up territory, or whatever; but there were existing contracts between Parke Davis and the other principal plaintiffs in those cases -- or principal defendants -- and some people to make certain arrangements to restrict competition in a market; and the person or the plaintiff was complaining of the fact that those contracts had been made.

THE COURT: Let's assume -- and I want to tell
you both -- that based on the allegations of the complaint,
I am prepared to grant the motion finding no dispute of
material fact -- that is, as to Section 1, Sherman -- no
dispute of material fact and entitled to judgment as a matter
of law.

Now, I know of no authority that says that a summary judgment motion cannot be addressed to the Complaint as pleaded; and when the other side does not seek a continuance for further discovery nor did it seek an opportunity to amend the Complaint until the hearing of the Motion for Summary

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Judgment, that the court cannot go forward and grant summary judgment; and that is what I propose to do. I think we will go forward.

I want the record to be quite clear that there was no request for a continuance of this summary judgment motion herein for the purpose of discovery or any other purpose on the part of the plaintiffs.

Now, excuse me a second. Let me get my papers in order, and we will go forward.

MR. AGAY: Your Honor, may I --

THE COURT: Hold on, please. I have to get my papers in order.

I have a trial going, and I have a benchful of papers from that and another benchful of papers from other matters today; so you will have to stay with me.

Here are the papers in the 20th Century matter, Mr. Clerk. Let's get them cleared out of here.

The clerk is going to check in chambers. I think I left my notes there.

One drowns in a sea of papers.

Among the reasons that I would grant the summary judgment and find the defendant entitled thereto as a matter of law as to Sherman I is that as pleaded, the arrangement complained of in terms of the photofinishers market is not anticompetitive. It is, in fact, procompetitive because,

as pleaded, we find the defendant staying out of this part of the business and thus benefiting every one of its potential competitors who is willing to develop this type of picture. It is procompetitive.

Moreover and as a separate reason, we have here in my view a proper application of rule of law enunciated some 60 years ago by the Supreme Court in U.S. v. Colgate.

That rule of law, to be sure, has been limited in its factual application in the intervening 60 years, but the Supreme Court continues to cite it with approval where the facts are appropriate; and the rule of law is this: That a business person, a trader, or manufacturer in private business is free to exercise an independent discretion as to the parties with whom he will deal, announcing in advance the circumstances under which he will refuse to sell. That is a paraphrase of the language from U.S. v. Colgate and has been cited many times with approval since that case was decided.

It appears to me also that if by any chance under Sherman 1 there is any restraint of trade involved, it certainly looks to me like a reasonable one.

Now, I want to press on to Sherman, Section 2.

Sherman 2 outlaws monopolies in interstate commerce,

conspiracies to monopolize, and attempts to monopolize.

As plaintiff agrees, there can be no conspiracy in this case in view of the single defendant.

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 Plaintiff does allege an attempt to monopolize and an actual monopoly.

Plaintiff says that Kodak's photofinishing service in the development and printing of still photography on colored film is so much superior to all others that it should be deemed to constitute a market in and of itself. On that, I think there is probably a dispute of material fact in the evidence. Whether this is a market and a market in and of itself involves factual matters; and there is a dispute in the declarations that I have.

If there is a separate market on the part of Kodak, it is a monopoly thereof of Kodak. That monopoly may turn out to be either illegal or benign, and that gets us back to the question of the predatory aspects, if any, in the history of that monopoly by which it was created or is attempted to be created.

I have to tell you that although under the briefs both sides seem to assume that one developer out of hundreds or thousands of photo labs, one developer may constitute a market in and of itself if its product is greatly superior; so I have accepted that assumption, but I sure want you to try to marshal some further authority on it if the issue comes up again.

I know a little bit about photography as an amateur photographer and about developing, and I know and it would

not be difficult to take judicial notice of the fact that hundreds of custom finishing labs exist in the various cities of this country who are prepared to and do solicit the developing and printing of colored film; and those labs and many of them, (A), charge more money than Kodak, a lot more; and, (B), they sell their services as being vastly superior to Kodak's; and I am therefore a little bit skeptical about this legal claim that this is a separate market so superior that it must be regarded as a market in and of itself. Those are factual matters.

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Our Circuit in the Industrial Building case notes
the claim made by one of the parties that one person's
product -- in our case, it's one person's services -- can be
so distinctively better as to constitute a market all by
itself; and that the Circuit, in noting that claim, expressed a
lot of doubt about it, but they did say that there should be an
opportunity to show it factually; and I think for that reason
that I would decline any summary judgment at this point on
Sherman 2.

The case I have in mind -- I don't know if you cited it -- is Industrial Building Materials v. Interchemical Corp., 437 F.2d 1336.

It's black-letter law, gentlemen, that even if there is a monopoly or an attempt to monopolize in a market, it is not redressable under Section 2 unless the monopoly

was achieved by predatory methods or the attempt is being made by predatory methods and with a predatory intent.

MR. McDONOUGH: Your Honor, before you pass beyond Section 2, may I be heard briefly?

THE COURT: I haven't passed yet. I am still ruminating about Section 2. If you will be seated, I will finish ruminating, and then we will let you speak, and we will hear from you.

I will talk a little bit about this: Defendants make an argument that if they have a monopoly under Section 2, plaintiffs are not hurt by that monopoly; and, thus, the complaint on the Cause of Action for Section 2 ought to be dismissed.

Maybe, Mr. Agay, you will come to the podium and tell me what injuries you say that you have suffered from the alleged monopoly or attempt to monopolize, and where that injury is alleged in the Complaint.

MR. AGAY: May I have one moment, your Honor? THE COURT: Sure.

MR. AGAY: The question, I believe, is whether or not we are within the target area of the acts that we complain of. We are the direct customer of -- the potential direct customer of Kodak. I don't know how much more direct we could be than that. We are the ones that are injured by the fact that they have the monopoly. We are the ones who

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are unable --

THE COURT: Well, let me put this to you: What is the injury? Is it the fact that you can't get your pictures quite as nice as you think Kodak and Kodak alone can develop them?

MR. AGAY: Well, that is the primary injury. The ancillary injury is that we are restricted in our ability to compete with other magazines.

THE COURT: Well, first of all, Kodak's policy -and there is no conflict in the evidence on this -- is applied
across the board to everybody who wants them to finish this
kind of picture, isn't it?

MR. AGAY: Well, there is that allegation, your Honor. We have information that that isn't true, but we haven't had a chance at discovery to prove that.

THE COURT: Well, again, I have to take the evidence as I find it; and here it is: That this is Kodak's policy across the board fairly and evenly applied to everybody, magazines or nonmagazines.

MR. McDONOUGH: Right.

THE COURT: They have announced publicly that they will not develop this kind of picture; so don't give them the rolls to develop. That is what they say.

Now, how can you be injured competitively if every other magazine is in the same boat?

 MR. AGAY: Every other magazine doesn't use this subject matter.

THE COURT: Every other magazine built around the pictures of nude ladies. I think that should be stated as a basis in posing this whole case. Your two magazines are built around and centralized around pictures of nude ladies, isn't that true?

MR. AGAY: I don't know if it's centralized. It is certainly --

THE COURT: We have the two exemplars. They speak for themselves.

MR. AGAY: Yes.

THE COURT: Now, if you accept that every other magazine similarly stressing those pictures must meet the same policy problems that you do, thus you are not competitively disadvantaged; isn't that correct?

MR. AGAY: With all due deference, your Honor,

I don't say that we compete with Cosmopolitan and every other
magazine. Perhaps the magazines we would compete more with
are magazines with pictures that are slanted on this --

THE COURT: Is there any affidavit that you have furnished me that says that you compete with Cosmopolitan or anybody else?

MR. AGAY: We compete with all magazines. I am not certain -- there is no affidavit that says that we don't,

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which is the problem here at hand.

THE COURT: Except I have the exemplars of the magazines, and it would appear to me strange -- if I can take judicial notice of Cosmopolitan, and I have seen it many times -- that to be told that you are competing with that magazine. You are saying that is factual now, and it is raised by the evidence; is that it?

MR. AGAY: I couldn't point to the evidence.

All I can say is that there is no request for judicial notice nor could there be judicial notice that the only magazines we do compete with are others equally affected by this formulation of policy.

THE COURT: Can you tell me anything else about the injury from this monopoly or attempted monopoly? What other injuries are there?

MR. AGAY: I would say that our competition, our ability to compete with other magazines, is the damage that we suffer in connection with the Section 2 claim.

May I point out one other thing? In answer to several comments the court has made and in particular this one, we do point out at the threshold of our brief that there has been no discovery; and many of these matters are peculiarly within the knowledge solely of Kodak.

THE COURT: What do you think the court is supposed to do?

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24 25 Let's now discuss the summary judgment practice.

Are you saying that a court, met with a summary judgment motion and not confronted with any request to continue for the purposes of discovery or anything like that, can say, "Oh, sure. They are entitled to a summary judgment on the evidence I have, but maybe the plaintiff will get some other evidence somewhere, sometime; so I'd better not give the summary judgment."

Is that the way you see summary judgment practice in the federal court?

MR. AGAY: I believe that is what the authorities cite. A chance should be given for discovery, especially in antitrust cases.

THE COURT: Isn't there an obligation to seek a continuance for that purpose?

MR. AGAY: Not in the case that we have cited and reviewed, your Honor, starting at page 7 --

THE COURT: Hold on. Let's take a look at them.

Gentlemen, we are getting so late in the day that we will probably have to continue this to another day.

I want to look at your response and look at the cases you are talking about. Hold on.

I find your declarations, but I can't find your opposition memo. What page?

MR. AGAY: Starting at page 7, your Honor.

THE COURT: Let's hear one of those cases.

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What are the facts in that case? What was the motion? to dismiss? or for summary judgment?

MR. AGAY: I believe in each of these, it was for summary judgment.

THE COURT: Was it a Rule 12 or a different kind of rule?

MR. AGAY: I believe each of these was a Rule 56 or a motion for summary judgment. I confess not to have the facts in mind.

THE COURT: How about that, Mr. McDonough?

Let's discuss such summary judgment practice.

MR. McDONOUGH: Yes, your Honor.

It seems to me that the practice is very clearly set forth in Rule 56(f), which provides that in the event that someone confronted with a motion for summary judgment feels that he needs more time to be able to respond, he is supposed to file an affidavit with the court in which he sets out under oath what it is that he thinks he can get, and why he thinks that would be material or make a motion under Rule 56(f) which would justify the court in continuing the motion, which is precisely what the rule says; and that is what the practice is, as I understand it, and what the practice should have been if the plaintiff wasn't prepared to respond to the motion and either fall or win on the basis of the record now before the court.

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24 25 THE COURT: Well, Mr. Agay, that is what 56(f) says; and I do not find any affidavit from you that meets the requisites of Rule 56(f).

Did I miss it?

MR. AGAY: No. The only discussion we have of that, your Honor, is on these pages on the Memorandums of Points and Authorities.

The only discussion that we have for the need of delay is on page 7.

THE COURT: There is no motion, and there is no affidavit.

Let's take another brief recess. I want to take a quick look at some of the learning under 56(f).

(Brief recess.)

THE COURT: Are you telling me, sir, that the cases cited at the top of page 8 in your memo are like this? You have no affidavit and no request for continuance but a statement by the Appellate Court that you can't take the record as you find it. Even though they haven't asked for any continuance, you have to give them time? Is that what the law is?

MR. AGAY: I don't want to make that representation without rereading the case, your Honor.

THE COURT: All right.

Gentlemen, I will tell you later what I am going

to do with respect to the First Cause of Action, which has a jumble of claims under Sherman 1 and Sherman 2.

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I now am going to proceed to the Second Cause of Action and to the Third Cause of Action, which will be discussed together.

Counts Two and Three are Federal Civil Rights claims under Section 1983 of Title 42. That is Count Two, the 1983 claim; and Count Three is a Fifth Amendment claim. Both depend on state action or governmental action.

Defendants have before us evidence uncontradicted that indicates there is no state action. Their evidence is that they have had no threats of prosecution or contacts with the state of federal officials although they admit that the motivation for their policy for not developing this type of film rests in the state obscenity laws and their fear of prosecution thereunder.

Plaintiffs claim first that the requisite governmental action is furnished by state and federal trademark laws
and federal patent laws. I do not find requisite government
action from those laws.

I think plaintiffs are similarly wrong on the law, and they have cited no persuasive authority to support this claim.

It is my tentative view that a refusal to provide service and to deal based on fear of prosecution under state

law does not constitute state action sufficient to support the Second and Third Causes of Action, and I propose to grant the motion as to them.

 There are several ways of rationalizing this result. In the first place, the case here is not a race discrimination case; and our own Circuit has recognized that state action requirements are different in race discrimination cases than they are in other cases. The decision I have in mind is Adams, decided in 1973, 492 F.2d 324.

The plaintiffs argue that it is improper to distinguish between race discrimination and First Amendment-type cases, which they say the instant case is.

There are cases, however, finding no state action even though the rights claimed are of the First Amendment type. One of those that was typical of that group is a case called Grafton v. Brooklyn Law School, 478 F.2d 1137 decided by the Second Circuit in 1973.

Additionally, I think the law is tending to a recognition that borderline obscenity material that might well fall within obscenity laws is not entitled to the same panoply of protection as are other First Amendment-type materials.

Four members of the Supreme Court have already articulated this concept in Young v. American Mini Theatres; and I believe the law is tending in that direction. That

is just really another reason for saying that our case is different from the cases where Southern restaurant owners did not serve blacks and/or their white supporters for fear of prosecution under Southern municipal ordinances segregating the races.

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Another factor should be mentioned. In all of those race cases, as the Supreme Court has said a couple of times, the statutes involved were clearly and beyond dispute invalid. Invalid, really, the Supreme Court said, on their face; and here the statute that is being discussed is quite different.

Kodak is concerned about state and federal statutes which carefully track the decisions of the Supreme Court, the recent decisions on obscenity. Those statutes are presumptively and probably valid. They have been adjudicated as being valid; so that is an additional reason for not applying the state action concept that has come down to us in those restaurant cases.

There is another factor that, at least, ought to be hinted at or put on the table. There may well be a privilege that constitutes a defense in both an antitrust economic context and a Civil Rights context where the action complained of is for the purpose of avoiding contravening, presumptively valid statutes of this kind. I don't articulate that as a privilege, but the law may also be developing in

that direction.

Now, I want to move on to Count Four; and when I am through, I will let counsel discuss Counts Two, Three, and Four together.

Count Four seeks declaratory relief in the form of a declaration that both state and federal obscenity laws are unconstitutional. Count Four seeks to have both state and federal obscenity laws declared unconstitutional as applied to Kodak or someone else in Kodak's position who is merely a developer and photofinisher of photographs.

It is clear that these laws, both sets, have been adjudicated as valid in criminal cases and other contexts.

My tentative view is to dismiss Count Four. I say, "dismiss." It could just as easily be a summary judgment, but I say "dismiss." It would be a holding, if I used summary judgment, that there is no bona fide dispute of material facts and that no entitlement has been shown as a matter of law.

The reason to grant the Motion to Dismiss is that there is no case or controversy; and there is no constitutional issue involving either federal or state obscenity laws -- particularly state -- when the case is pending in the federal court, nor should it be decided in a federal court without a case or controversy.

Kodak tells us it has no interest in upholding

either set of laws; and, as I have stated, neither set of laws has been asserted by the government involved against Kodak. There has been no threat of prosecution or other action yet posed. In essence, if the court went forward, we would have a collusive action or certainly one in which the interests of both the state and federal government are not represented in the sense of the laws challenged as unconstitutional.

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Plaintiff says, however, that there is a way of having those governmental interests represented.

Plaintiff points to 28 U.S.C. Section 2403.

That section permits this court to notify state and federal officials of the pendency of this action and permits those government officials to intervene in this case, if they choose to do so.

There is, however, case law that the existence of 28 U.S.C Section 2403 does not make what is otherwise no case or controversy into an actual case or controversy.

The courts read Section 2403 as merely permitting intervention where the state government and federal government and their officials are not directly named as defendants. The courts have persisted in the holding that there is no case or controversy despite the existence of that statute.

The cases that so hold are U.S. v. Johnson,
319 U.S. 302, and Ruotolo v. Ruotolo, that's R-u-o-t-o-l-o,

572 F.2d 336, decided by the First Circuit in 1978. So my proposed action is to grant the motion and dismiss without any leave to amend Counts Two, Three, and Four. My proposed action as to Count One with respect to both the Sherman 1 and Sherman 2 claims is to grant a Motion to Dismiss with a right to plead over, which pleading, if it is made, will separately state Sherman 1 and Sherman 2 claims with some specificity; then the plaintiffs may do one of two things. They may move immediately to dismiss -- not for summary judgment, but to dismiss -- those claims, Section 1 and Section 2; or they may wait for discovery, a reasonable period being 60 days, to allow plaintiff to discover and may thereafter move for summary judgment.

Now, I will hear from plaintiffs first, bearing in mind two things: The lateness of the hour and the fact that I have obviously given considerable thought to this matter.

MR. AGAY: If the court please, Kodak has come up with a policy which does not track with either law, doesn't use the words "patently offensive," is totally dissimilar to the policy in the federal act and state act, and now refuses to return the pictures under its censorship.

THE COURT: Now, so far as returning, that is a matter pending in the state court, which is a far better tribunal for the adjudication of that matter.

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MR. AGAY: As the affidavits point out, to get those pictures back two years later would be of little value, if any.

What is needed is a determination as to whether or not in this intermediate step which -- I ran across a case which I didn't know before, which California has already held that you can't stop somebody in an intermediate stage. I can give the citation later, if need be -- to say that in this intermediate stage the law is going to permit or to allow a private party to act as to have a prior restraint and that there is no remedy either by challenging the application of the act under the Fourth Cause of Action; and assuming that it is proper, then Kodak's action is improper under the Second or Third Cause of Action grants to everyone the right to claim that this act permits them to do anything -- to withhold property or to do anything under the fear of prosecution; and if the government did that, there would be no doubt but that there were a prior restraint which would be struck down; and the cases we have cited show that if a private party does it, the same results obtain.

The court pointed out that there is maybe a distinction in the quantum of proof necessary to find state action in discrimination cases as opposed to First Amendment cases.

I have some difficulty with those decisions which state that there is a different standard. Either the state

is involved, or it is not involved. What the court does not mention is that we have also cited the abortion case; and there has been no statement that I have heard from the court or that I have read that says also in the abortion cases we'll have to come up with a different standard than we will in the instance of freedom of speech; so the statement dicta or otherwise say that we have got different ground rules when we are determining whether there is a state action in the discrimination cases would not apply to the doctor prohibited from performing the abortion in the case that we have cited.

There they found state action because of the -- I guess it was federal funds to construct the hospital in that particular instance so that if there can be state action there, why not here where the party admits, "The only reason we are not doing this is because of a federal law and a state law; and, therefore, we can interfere where the government could not in the return of the property."

We believe and the court has stated that there has never been a threat against Kodak of prosecution, although they have been doing this for years. There has never been a threat against Kodak for any prosecution.

Why is it now that they should be able to withhold it under the color of these laws which the government cannot do because it would constitute a prior restraint if the government did it, clearly.

Why can they do indirectly, when the cases say they can't, why can they do indirectly -- the government -- what they cannot do directly.

The brief points out, and it is clear that the effect of what is going on is Rodak is acting as a censor. It looks at every transparency and says, "This is good, this one's not. This one's good, this one's not," for a magazine publisher, not for the amateur user, who doesn't care whether he gets it back the next day or next week.

For the magazine publisher, this censorship totally or dramatically interferes with his ability to publish. In the noted cases, they tell us, "Don't interfere with the editorial rules. Don't get involved with the editorial rules."

THE COURT: Even though it is on notice and assumes the risks when it delivers that film for processing by Kodak?

MR. AGAY: Maybe if Kodak had said, "We make the determination ourselves that we don't want to be involved in this." Maybe it would be a different problem in that they are avoiding state action; but when Kodak says, "We do this under threat of law." And they claim that is the reason they are doing it because of this law, then so far as state action is concerned, there is state action.

Insofar as the other elements the court mentioned, if it is unconstitutional to do, then the contract of adhesion, if it is a contract, would not be valid anyway for the reasons

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we pointed out in our brief, that this simple notice cannot constitute a waiver in and of itself especially of a constitutional right.

Now, at the time those transparencies are returned, nobody knows what will be the ultimate content of the magazines; and to allow the proscription of the return -- or to permit the proscription of the return of negatives and bar someone from getting those negatives or transparencies in a fashion that is usable, at least to the standards of this magazine and others, under the threat of federal law, so they claim, and under the threat of state law, so they claim -- I don't know how there could be clearer state action unless the state said, "And we mean that Kodak or developers shall not even permit the transmission of those transparencies."

We don't believe the laws were intended to apply to Kodak. We believe that the court has stated that the proof lies in the pudding that nobody ever made any noises against Kodak; and yet we are standing here on the horns of a dilemma. We can't attack the law directly. The federal law we certainly can't attack in the state court very efficaciously; and we can't attack their failure to return the pictures because the mere --

THE COURT: How long are you going to need to argue this matter?

MR. AGAY: I think I'll be through very briefly.

THE COURT: I don't mean to rush you. I just want to know because I have some engagement which I want to be sure I get to; and I want to give the other side a chance.

MR. AGAY: Rather than rushing, as the court indicated earlier, maybe we could continue it. I would prefer that because obviously the effect of the court's order would be --

THE COURT: How long will you need, Mr. McDonough? You heard the court's indicated decision.

MR. McDONOUGH: Yes, your Honor. I am satisfied with that indicated decision. I am not totally satisfied with it, but it seems to me it disposes the matters that were brought to the court today in our favor.

As I understand it, it gives him the opportunity to present --

THE COURT: I will give you five or six minutes more.

MR. AGAY: May I ask for a continuance? I think the court indicated earlier that --

THE COURT: That will be denied. I'd rather finish.

I have an important case in trial, and I just can't interrupt it; and I don't know when it would ever end so that I can get back to this one.

MR. AGAY: May I review my notes?

THE COURT: Of course. Take your time.

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 MR. AGAY: The court pointed to the fact that it believes that there is a broadening of the law that if there is something akin to obscenity, then it doesn't receive the same protection as other materials.

I respectfully disagree especially if that determination is made in advance of the publication without viewing the entire publication which, of course, would be impossible until the pictures are ultimately published.

THE COURT: The consequence of your argument is that even though there is criminal responsibility for aiding and abetting a criminal violator, that one must take the risk if he is asked to process part of a magazine or what may go into a magazine which may seem to that processor obscenity and put him in liability as an aider and abettor because he doesn't know what is going to be in the magazine as a whole? Is that your position? It is just too bad if the magazine as a whole turns out to be obscene? Then he can be held, but he can't do anything about it?

MR. AGAY: No, that is not my position. That is why I believe the Fourth Cause of Action is the appropriate cause of action and the appropriate way of dealing with this.

First of all, the answer to the court's question is that same question could have been posed with respect to the abortion matter. The hospital party was subject to criminal --

THE COURT: That is the Fourth Circuit. That is not our Circuit, and it stands alone. Everybody else, including the Ninth Circuit, indicates that there is a difference between the rule of those restaurant cases as extended in via Fourth Circuit to the abortion cases and the rest.

MR. AGAY: Well, to the extent that there be a dilemma, if there really be a dilemma, and I question that for the same reasons as before that there never has been a prosecution, to the extent that there is a dilemma that the court foresees for these people and to the extent that there is a counterclaiming problem -- but here we have a private party setting itself up as the censor and the determiner of what it is that can be published and what it is that can't. If, as we have indicated, it is the only one who gives a good product, and if we pose a different example, what if it were a motion picture that we were involved in that they were developing, and what if they got the dailies and just saw some frames. They'd say, "Which pictures can be seen ultimately on the screen or which can't?"

What if they were getting excerpts from Ulysses in little bitty parts? Instead of photographing it, they were printing it, and they said, "This part is no good. You can't have it back. This part is good. You can have it back." We'd never have the opportunity of seeing the finished work if what the court is saying is correct, that we apply

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the statutes to the developer and we apply these statutes to the person that made the paper.

If these statutes were applied to the one that made the paper, they would say, "Well, if I sell them to Hustler, maybe they are going to be used in a magazine. Maybe I can be prosecuted."

The answer is that the statute is not intended to be so broadly construed, and there is no forum to get that construction especially when our dispute is with Kodak in the first place and there has been no threat of prosecution by the U.S. Attorney so that I believe that this is the appropriate place.

If Kodak doesn't have the concern although it fought pretty hard on the Fourth Cause of Action, if Kodak really doesn't have a concern, I believe that there is a dispute between us that should be declared that Kodak is not subject to these sanctions when it merely returns first edition film.

Maybe a different standard applies if we sent in pictures for redevelopment.

THE COURT: I'm sorry, sir, but your time has now expired.

The court's indicated decision will be the court's decision of findings and those that I have orally expressed.

I would like the defendants to order a transcript, please, of all proceedings this afternoon. That transcript,

as soon as it is prepared, will be filed and will constitute the court's findings and conclusions.

Let it be clear that to the extent that I have granted any summary judgment, I have found that both parties dispute the material facts and that the moving party is entitled thereto as a matter of law.

Now, as to the First Cause of Action, the new complaint setting forth in separate counts and with some specificity the Sherman 1 and the Sherman 2 claims must be filed 10 days from today; and then, the plaintiff thereafter will have 60 days for discovery before the defendant can file any summary judgment motion, but defendant is not barred from filing a motion to dismiss earlier than that.

All right, gentlemen. Court is adjourned.

MR. McDONOUGH: Thank you, your Honor.

IN	THE	UNITED		STATES	D	ISTRICT	COURT
	CENT	TRAL	DIS	TRICT	OF	CALIFO	RNIA

EUSTLER MAGAZINE, INC., et al.,

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Plaintiffs,

EASTMAN KODAK COMPANY,

v.

Defendant.

CV 90-0561-IH

CERTIFICATE

I hereby certify that I am a duly appointed, qualified, and acting Federal Court Reporter of the United States District Court for the Central District of California.

I further certify that the foregoing 44 pages are a true and correct transcript of the proceedings had in the above-entitled cause on Monday, September 22, 1980.

and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this

29th day of September , 19 80 .

XAVIER MIRELES Federal Court Reporter

C-4

TEXT OF AMENDMENTS TO THE CONSTITUTION

AMENDMENT [I]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TITLE 18

§ 1481. Mailing obscene or crime-inciting matter

Every obscene, lewd, lastivious, indecent, filthy or vile article, matter, thing, device, or substance; and-

Every article or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; and

Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for producing abortion, or for any indecent or immoral purpose; and

Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means abortion may be produced, whether sealed or unsealed; and

Every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can, be used or applied for producing abortion, or for any indecent or immoral purpose, and

Every fescription colculated to induce or ireits a person to no use or apply any such article, instrument, substance, drug, medicine, or thing—

Is declared to be nonmaliable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section or section 3001(e) of itie 39 to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than \$5,000 or imprisoned not more than \$10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

The term "indecent", as used in this section includes matter of a character tending to incite arson, murder, or assessination.

§ 1462. Importation or transportation of obscene matters

Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

- (a) any obscene, lewd, lascivious, or flithy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; or
- (b) any obscene, lewd, lascivious, or filthy phonograph recording, electrical transcription, or other article or thing capable of producing sound: or
- (c) any drug, medicine, article, or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of such mentioned articles, matters, or things may be obtained or made; or

Whoever knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful-

Shall be fined not more than \$5.000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than \$10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

§ 1465. Transportation of obscene matters for sale or dis-

Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fixed not more than \$5,000 or imprisoned not more than five years, or both.

The transportation as aforesaid of two or more copies of any publication or two or more of any article of the character described above, or a combined total of five such publications and articles, shall create a presumption that such publications or articles are intended for sale or distribution, but such presumption shall be rebuttable.

When any person is convicted of a violation of this Act, the court in its judgment of conviction may, in addition to the penalty prescribed, order the confiscation and disposal of such items described herein which were found in the possession or under the immediate control of such person at the time of his arrest. Added June 28, 1935, c. 190, § 3, 69 Stat. 183.

TITLE 28

§ 2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

CALIFORNIA PENAL CODE

§ 311.2 Sending or bringing into state for sale or distribution; printing, exhibiting, distributing or possessing within state; exemptions

(a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is guilty of a misdemeanor.

(b) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others for commercial consideration, or who offers to distribute, distributes, or exhibits to others for commercial consideration, any obscene matter, knowing that such matter depicts a person under the age of 18 years personally engaging in or personally simulating sexual intercourse, masturbation, sodomy, bestiality, or oral copulation is guilty of a felony and shall be punished by imprisonment in state prison for two, three, or four years, or by a fine not exceeding fifty thousand dollars (\$50,000, in the absence of a finding that the defendant would be incapable of paying such a fine, or by both such fine and imprisonment.

(c) The provisions of this section with respect to the exhibition of, or the posacasion with intent to exhibit, any obscene matter shall not apply to a motion picture operator or projectionist who is employed by a person licensed by any

city or county and who is acting within the scope of his employment, provided that such operator or projectionist has no financial interest in the place wherein he is so employed.

(d) Except as otherwise provided in subdivision * * * (e), the provisions of subdivision (a) or (b) with respect to the exhibition of, or the possession with intent to exhibit, any obscene matter shall not apply to any person who is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such employed person has no floancial interest in the place wherein he is so employed and has no control, directly or indirectly, over the exhibition of the obscene matter.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HUSTLER MAGAZINE INC., a corporation, and CHIC MAGAZINE, INC., a corporation,

Plaintiffs-Appellants,

VS.

EASTMAN KODAK COMPANY, a corporation,

Defendant-Appellee.

APPELLANTS' BRIEF

- ISSUES PRESENTED FOR REVIEW. This appeal raises the following issues:
- 1.1. Does censorship of speech in the form of pictures 1/ "based upon fear of criminal prosecution" 2/ under federal and state laws constitute state action 3/ by one who has received state and federal trademark and patent grants?

^{1/} In this case the pictures are in the form of
 transparencies. Pictures are within the ambit of
protection of the First Amendment of the United States
Constitution ("First Amendment"). N. 7 in Erznoznik v. City of
Jacksonville, 422 U.S. 205,211, 95 S.Ct. 2268,2273 (1975).
"[P]lays, motion pictures and photographs are protected forms
of expression, Joseph Burstyn, Inc. v. Wilson, 343 U.S.
495,502, 72 S.Ct. 777 (1952)." St. Martin's Press, Inc. v.
Carey, 440 F.Supp. 1196,1204 (S.D.N.Y. 1977). Magazines are
likewise protected, and are presumptively protected material
under the First Amendment. Penthouse Intern., Ltd., v.
McAuliffe, 610 P.2d 1353,1359 (5th Cir. 1980). "It is of no
significance that expression which is protected by the First
Amendment takes place in a commercial setting. Bantam Books,
Inc. v. Sullivan, 372 U.S. 58, 83 S.Ct. 631 (1963)." La Rue v.
State of California, 326 F.Supp. 348,354 (C.D. Calif. 1971).

^{2/} Trial court's finding. (Excerpt ("Ex.") 389:25.)

^{3/} The second count of the instant Complaint is brought under \$1983 which requires that the challenged conduct be (Cont'd)

1.2. If pictures are confiscated by a film processor, acting by reason of state and federal laws purportedly requiring such confiscation, without due process or compensation, is a magazine publisher who owns the pictures entitled to a determination of the constitutionality of the application of such laws where the pictures have not yet been subjected to editorial process from which it is determined if the picture should be published, if so what portion, if so in what context within the individual article, and if so the overall content of the magazine?

2. STATEMENT OF THE CASE.

2.1. NATURE OF THE CASE. Appellants ("Plaintiffs")
seek damages and injunctive relief under 42
U.S.C. \$1983 ("\$1983") and the First and Fourteenth Amendments
to the Constitution of the United States ("Amendment(s)") by
reason of Appellee's ("Defendant" or "Kodak") interference with

^{3/ (}Cont'd) done "under color of any statute, ordinance, regulation, custom or usage, of any State or Territory." under color of law requirement of \$1983 has been treated as the equivalent of the state action requirement of the Pourteenth Amendment." Adams v. Southern Calif. First Nat. Bank, 492 F.2d 324,329 (9th Cir. 1973). For purposes of determining whether a private party is subject to prohibitions of the Amendments to the Constitution, "state action" includes both federal action and action by one of the several states (Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959,967 (4th Cir. 1963)), but might technically better be described generically as "governmental action" (footnote 5, Jackson v. Statler Foundation, 496 F.2d 623,627 (2nd Cir. 1974)). Defendant concedes that in light of the third count, seeking recovery based upon the First and Fourteenth Amendments, the determination of governmental action (state action) must consider not only the involvment of the State of California, but also the United States. (Ex. 84:17.) Acknowledging the Jackson statement that "governmental" would be a better descriptive word, since the words "state action" as including both federal and State actions have been repeatedly so used, we shall refer to "governmental action" or "state action" interchangeably to include both federal and State action.

Plaintiffs' exercise of their rights of free speech through Defendant's refusal to return Plaintiffs' pictures to Plaintiffs on the basis of \$311.2 of the California Penal Code ("\$311.2") and 18 U.S.C. \$\$1461, 1462 and 1465 ("\$\$1461-5") and Plaintiffs further seek a declaration that \$\$311.2 and 1461-5 cannot be applied so as to subject a film processor to criminal prosecution by reason of returning pictures to the owner for possible subsequent use in a magazine.

- Complaint and Defendant filed its Answer. The
 Complaint is in four counts, the first of which is for
 anti-trust violations, the second is under \$1983, the third is
 for violation of First and Fourteenth Amendment rights and the
 fourth is for declaratory relief. Pursuant to court order,
 counsel met to discuss a discovery program. Within a few days
 thereafter, and prior to the initiation of any discovery (and
 none has been undertaken), Defendant filed a motion for summary
 judgment. On September 22, 1980, the trial court announced its
 decision to grant the motion as to the second, third and fourth
 counts and to grant the motion (to dismiss) the first count,
 with leave to amend within ten days. The Court ordered that
 the transcript of those proceedings would constitute its
 findings and conclusions. (Ex. 402:25.)
- 2.2.1. Appealable Order. On September 29, 1980, the district court entered its order dismissing count 1 and granting summary judgment as to counts 2, 3 and 4. (Ex. 407.) Plaintiff did not amend. On November 14, 1980, final judgment was entered. (Ex. 412.)
 - 2.2.2. <u>Timeliness</u>. Because of uncertainty as to

whether the order was intended as a final judgment. 4/ Plaintiffs timely filed a Notice of Appeal on October 28, 1980 (Docket No. 80-5861) with respect to the September 29, 1980 order (Ex. 415), and thereafter a Notice of Appeal with respect to the final judgment (Docket No. 80-6077) on December 15, 1980 (Ex. 417). On January 22, 1981 this Court ordered consolidation of the two appeals.

2.3. NINTH CIRCUIT RULE 13.

- 2.3.1. <u>Jurisdiction--District Court</u>. The second count seeks redress by virtue of actions under color of State law. The district court had subject matter jurisdiction thereof under 28 U.S.C. §1343(3). The third and fourth counts arise under the First Amendment and with respect to federal laws and the district court had subject matter jurisdiction under 28 U.S.C. §1331.
- 2.3.2. <u>Jurisdiction--Court of Appeals</u>. This appeal is from a final judgment. This Court has jurisdiction under 28 U.S.C. §1291.
- 2.3.3. Attorney's Pees. Although 42 U.S.C. \$1988

 provides for an award of attorney fees in the

 Court's discretion, without stating the need for a showing of

 bad faith, frivolousness or vexation, in addition to the trial

 court's not making any such award, we believe the cases

 interpreting the section require such a showing. If

 nonetheless Defendant again seeks an award of attorney fees

 from this Court, then as a protective measure, we do likewise.

^{4/} A stipulation by Plaintiffs and Defendant was proposed to the district court to clarify that it was not, but such stipulation was rejected. (Ex. 421.)

2.4. STATEMENT OF PACTS. Plaintiffs gave film to Defendant for developing. Defendant refused to return the developed pictures. (Ex. 365:38.) Defendant has adopted a policy and practice of confiscating film delivered to it for the purpose of developing if it determines the film to be obscene. (Ex. 103:11-104:9, 106 and 107.) Plaintiffs are unable to obtain quality processing from other sources. (Ex. 279:14, 296:5, 301:19, 306:16, 310:22.) Defendant's practice was adopted because of its fear of prosecution under, and

Defendant's developing film for a publisher is merely an early intermediate step in Plaintiffs' publication process (Ex. 274:15-278:21) and Defendant is aware of that fact (Ex.

therefore under color of, both federal and State laws. (Ex.

potential legal problems mentioned above." (Ex. 106.)
"There are State and Federal Statutes which prohibit the distribution of pictures depicting certain types of sexually explicit conduct. When Kodak discovers pictures in a customer order depicting such conduct, it cannot return those pictures to the customer without risking criminal prosecution for violating the law. Kodak will not return such pictures to the

violating the law. Kodak will not return customer. (Ex. 107.) (Emphasis added.)

400:90.15/

Defendant's proposed finding of fact No. 7 in which Plaintiffs joined (Ex. 171 and 315) recites that its practice was adopted "for the purpose of avoiding the injury and expense that would result if Kodak and/or its employees were accused of violating the obscenity laws". Defendant makes the same concession in seven different affirmative defenses in its Answer (Ex. 18-21) and in admitting Plaintiffs allegations that its confiscation was done by reason of risk of criminal prosecution under \$311.2 (Ex. 14 and 15). Defendant's evidence (Ex. 102:19 to 103:25) and argument in brief (47:13-17, 48:12-49:2, 50:4-22, 54:6-12, 74:24-75:7, 79:15-20, 86:18-87:23 and 92:15-21) are the same.

^{5/} Defendant's own evidence states that: "Because of Federal and State laws relating to pornography Eastman Kodak does not wish to handle pictures that show sexually explicit conduct. . Pilm sent to Kodak for processing which depicts such subject matter will not be returned because of the potential legal problems mentioned above." (Ex. 106.)

124:21.) Although Defendant has the pictures $\frac{6}{}$ (and Plaintiffs have not seen them) Defendant's motion neither attaches nor describes the withheld pictures. $\frac{7}{}$

Plaintiffs' evidence (Ex. 276-278) shows that none of the following is known: (1) how the transparencies Defendant has refused to return would have been altered before publication, (2) which of the transparencies would have been used at all, (3) what the size of the pictures in the magazine would be, (4) the content of the text of article in which the pictures would appear, or (5) the overall content of the magazine. Defendant by footnote to its brief (Ex. 73) without any supporting foundation in any sworn statement refers to an attachment which purportedly contains copies of other publications by the Plaintiffs which obviously do not include the transparencies which Defendant has withheld.8/

^{6/} Plaintiffs submitted clear evidence that while the pictures held by Defendant may be under others' names, Defendant is withholding films belonging to Plaintiffs. (Ex. 289 to 293, 310:8, 312 and 313.) The trial court found that Defendant has retained and refused to deliver the pictures (Ex. 365:25), and Defendant at oral argument accepted this finding (Ex. 366:9).

^{7/} Plaintiffs do not believe that the contents of such transparencies is relevant in this litigation much less in this motion. Obviously no one can say what the film never even presented to Kodak (because of Rodak's confiscation practice) would have shown.

^{8/} Assuming the attachments to Defendant's counsel's brief were evidence, and that they were the product of Plaintiffs, viewing other magazines published by Plaintiffs is of no value. First, they do not demonstrate whether these (or any other) particular pictures in Defendant's hands would ever be used for the above reasons. Secondly, in United States v. Tupler, 564 F.2d 1294,1297-1298 (9th Cir. 1977), this Court stated that evidence "that both the sender and the recipient of the shipment were known dealers in sexually explicit materials; that one of the suspects in the case had previously been convicted of an obscenity offense and was currently under indictment for another; and that the clerk in the (Cont'd)

3. ARGUMENT.

3.1. STANDARD OF REVIEW. This Court in Heiniger v.

City of Phoenix, 625 F.2d 842,843 (9th Cir. 1980)
stated the standard of review as follows:

"STANDARD OF REVIEW

"A reviewing court will affirm a grant of summary judgment only if it appears from the record, after viewing all evidence and factual interferences in the light most favorable to the appellant, that there are no genuine issues of material fact and that the appellee is entitled to prevail as a matter of law."

In an action under \$1983, a defendant moving for summary judgment has the burden of foreclosing all possibility that the plaintiff could prevail, and it is the burden of the moving party to "establish the absence of a genuine issue" and not upon the opposing party to raise same and "even if no opposing evidentiary matter is presented." Adickes v. S. H. Kress and Company, 398 U.S. 144,157, 159,160 90 S.Ct. 1598,1608,1609 (1970).

The foregoing standard of review is consistent with the elementary rules applicable to motion for summary judgments which the trial court did not follow: the burden is upon the moving party to show absence of genuine issue, the inferences must be drawn in favor of opposing party, the evidence and legal theories must be viewed most favorably to opposing party and the court may not weigh conflicting affidavits of inferences. 2/

^{8/} (Cont'd) consignee bookstore described similarly labeled films as 'hard core' do not constitute evidence of the motion picture film under consideration.*

^{9/ &}quot;'If under any reasonable construction of the (Cont'd)

motion (Ex. 26) and summary of arguments (Ex. 51) raises four points in support of motion as directed to the second, third and fourth counts: as a matter of law and viewing all evidence and inferences most favorably to Defendant (1) there is no state action to justify relief under the second or third counts (Ex. 29:6 and 52:4), (2) as to the declaratory relief fourth count there is no actual controversy (Ex. 29:19 and 53:26), (3) Defendant was unable to locate pictures under Plaintiffs' name (Ex. 30:1), and (4) a claim for replevin would be adequate relief for Plaintiffs (Ex. 54:14). The third was specifically rejected by the trial court. (N. 6 above.) As to the last, the evidence submitted by Plaintiffs shows that relief in the form of getting back stale pictures is wholly useless (Ex. 274-284) and Defendant's assertion to the contrary

^{9/ (}Cont'd) evidence and any acceptable theory of law, one would be entitled to prevail, the summary judgment against him cannot be sustained.'" Garter-Bare Company v. Munsingwear, Inc. 650 F.2d 975,980 (9th Cir. 1980). "As the moving party, respondent had the burden of showing the absence of a genuine issue as to any material fact, and for these purposes the material it lodged must be viewed in the light most favorable to the opposing party." Adickes v. S. H. Kress and Co., 398 U.S. 144,157, 90 S.Ct. 1598,1608 (1970). These principles have been repeatedly relied upon by this Court in reversing summary judgments. Bell v. Cameron Meadows Land Company, F.2d 82 L.A.D.J.D.A.R. 773 (9th Cir. Feb. 22, 1982); Reed v. Lockheed Aircraft Corp., 613 F.2d 757,759 (9th Cir. 1980); Hoffman v. Babbit Bros. Trading Co., 203 F.2d 636,637 (9th Cir. 1953); and U.S. v. Western Electric Co., 337 F.2d 568,572 (9th Cir. 1964). "In ruling on a motion for summary judgment, it is not the function of the court to resolve existing factual issues through a 'trial by affidavits.' (United States v. Diebold, Inc., (1962) 369 U.S. 654, 82 S.Ct. 993. Lane Bryant, Inc. v. Maternity Lane, Ltd., of California, (9th Cir. 1949) 173 P.2d 559,565.) The court is to determine whether a genuine issue of material fact exists, viewing all evidence and factual inferences 'in the light most favorable to the party opposing the motion.'" Ramirez v. National Distillers and Chemical Corp., 586 F.2d 1315,1318 (9th Cir. 1978).

merely raises a triable issue of fact.

As to the remaining points Plaintiffs contend that both individually and collectively Defendant's acting as a censor under compulsion of State and federal laws, by virtue of State and federal trademarks and patents, preclude finding that Defendant has proved as a matter of law that there is no genuine issue as to the presence of state action in connection with its confiscation of Plaintiffs' pictures. Plaintiffs further contend that Defendant has not proved as a matter of law that there is a collusion between it and Plaintiffs demonstrating an absence of adversity to negate jurisdiction for declaratory relief.

Plaintiffs further contend that if Defendant is to be permitted to confiscate Plaintiffs' pictures by reason of its fear of prosecution under application the relevant statutes, then Plaintiffs must be afforded the opportunity to challenge the constitutionality of such application by the action for declaratory relief, for otherwise Plaintiffs would be left remediless even though such application of the statutes were unconstitutional.

Finally Plaintiffs contend that Defendant is not immune from these claims, that Plaintiffs did not waive their claims and the motion, made prior to any discovery, is premature.

3.3. DEFENDANT DID NOT SHOW ABSENCE OF EVIDENCE OF

STATE ACTION. As to counts two and three

Defendant's motion (Ex. 81:6) and the trial court's granting thereof (Ex. 389:10) are based upon the contention that as a matter of law there is no state action. If the lack of genuine issue on this subject exists, the conclusion must be that

Defendant's actions are state actions. According to Defendant itself, they are compelled by state and federal laws. $\frac{10}{}$

We agree with Defendant that a showing of "significant governmental action and involvement" is required. (Ex. 82:9.) The evidence, however, demonstrates that not only was the government involved, it was the catalyst for Defendant's actions by compelling the same. (N. 5 above.)

Defendant's claim that it did not act by reason of compulsion of law is premised on the subjective statements that its policy was not formulated at the request of law enforcement authorities or for the purpose of enforcing any laws. (Ex. 87:24.) Yet in the next sentence Defendant concedes that its practice of refusing to return certain pictures was motivated by the desire to avoid being charged with violation of laws.

3.3.1. State Action Arises From Compulsion of

Statutes. State action exists when a party is acting under compulsion of law. Adickes v. Kress & Co. 398 U.S. 144, 90 S.Ct. 1598 (1970); Robinson v. State of Florida, 378 U.S. 153, 84 S.Ct. 1693 (1964); Peterson v. City of Greenville, S.C., 373 U.S. 245, 83 S.Ct. 1119 (1963); and Doe v. Charleston Area Medical Center, Inc., 529 F.2d 638 (4th Cir. 1975).

In Adickes, the defendant refused to serve lunch to the plaintiff at defendant's restaurant. The plaintiff sued to recover damages under \$1983. In reversing summary judgment,

^{10/} Even were that the issue not determined as a matter of law in favor of Plaintiffs, it surely cannot be determined against Plaintiffs as a matter of law in face of the evidence showing such state action.

the Supreme Court stated (upper case being Court's emphasis):

"Although this Court has not explicitly decided the Pourteenth Amendment state action issue, ... underlying the Court's decisions in the sit-in cases is the notion that the State is responsible for the discriminatory act of a private party when the State, by its law, has compelled the act. As the Court said in Peterson v. City of Greenville, 373 U.S. 244 (1963): 'When the state has commanded a particular result, it has saved to itself the power to determine that result and thereby 'to a significant extent' has 'become involved' in it'. Moreover, there is much support in lower court opinions for the conclusion that discriminatory acts by private parties done under the compulsion of state law offend the Pourteenth Amendment. In Baldwin v. Morgan, supra, the Fifth Circuit held that '[t]he very act of posting and maintaining separate [waiting room] facilities when done by the [railroad] Terminal as commanded by these state orders is action by the state. The Court then went on to say: 'As we have pointed out above the State may not use race or color as the basis for distinction. IT MAY NOT DO SO BY DIRECT ACTION OR THROUGH THE MEDIUM OF OTHERS WHO ARE UNDER STATE COMPULSION TO DO SO. ' ...

"For state action purposes it makes no difference of course, whether the racially discriminatory act by the private party is compelled by a statutory provision or by a custom having the force of law.— in either case it is the State that has commanded the result by its law." 398 U.S. at 170-171. 90 S.Ct. at 1615. (Emphasis added.)

In the present case, Kodak claims that it is required to confiscate certain materials submitted to it because failure to do so would subject Kodak and its employees to criminal prosecution under \$311.2, 1461-5. What could be a clearer case of compulsion of law?

In <u>Robinson</u>, <u>supra</u>, the defendants' convictions for trespass were reversed because the owner's decision not to serve Negroes was merely encouraged by a regulation adopted by the Florida legislature, requiring that in places where Blacks were employed or accomodated, separate toilets be provided.

The Supreme Court found this to be a sufficient state involvement to constitute state action, because the requirement of separate facilities placed an added burden upon restaurants

serving both Whites and Blacks. If the owner's enforcing his ownership rights was subject to the Fourteenth Amendment, all because of the mere regulation which encouraged the discrimination, then Kodak's confiscation done under compulsion of state and federal laws must be subject to the First and Fourteenth Amendments.

Once the compulsion of statute exists, the subjective motivation for Defendant's act becomes irrelevant. In discussing Peterson, supra, the court in Robinson, supra, stated:

"[A] Greenville ordinance which made it unlawful for restaurants to serve meals to white persons and colored persons in the same room or at the same table or counter. In Peterson the city argued that the manager's refusal to serve Negroes was based on his own personal preference, which did not amount to 'state action' forbidden by the Fourteenth Amendment. But we held that the case must be decided on the basis of what the ordinance required people to do, not on the basis of what the manager wanted to do. We said: 'when a state agency passes a law compelling persons to discriminate against other persons because of race, and the State's criminal processes are employed in a way which enforces the discrimination mandated by that law, such a palpable violation of the Fourteenth Amendment cannot be saved by attempting to separate the mental urges of the discriminators'. 378 U.S. at 155-156,84 S.Ct. at 1695. (Emphasis added.)

According to Kodak it is likewise <u>compelled</u> by law to confiscate Plaintiff's transparencies. Kodak's argument (concerning which there is conflicting evidence) that this does not amount to state action because it unilaterally adopted its practice (Ex. 53:19) must be equally unavailing.

Doe v. Charleston, supra is extremely similar to the case at bar. The plaintiff sought declaratory and injunctive relief against a hospital for refusing to allow the plaintiff's physician to perform an abortion at the defendant's private

hospital. The defendant's policy stemmed from fear of criminal prosecution under a state law prohibiting abortion unless necessary to save the life of another. In finding "state action" for purposes of \$1983 the Court stated (with emphasis added):

"Since state involvement through a custom having the force of law satisfies the 'color of law' requirement of 42 U.S.C. §1983, a fortiori the statute in this case meets the requirement... In this case, a letter from Mr. Arnwine, president of CAMC, set forth the hospital's policy and the motivation for that policy as follows: 'The present policy... with respect to performance of abortions at its hospital facilities is to literally adhere to the mandate set forth in Chapter 61, Article 2, Section [8] of the West Virginia Code. As you are aware, this statute limits the performance of abortions in the State of West Virginia to those instances where such act is done in good faith with the intention of saving the life of such woman and child...'

"It seems clear that the anti-abortion hospital policy rests firmly upon what was thought to be the compulsion of state law. Thus the hospital acted 'under color of law'"... 529 F.2d at 643-644.

There is no question but that Defendant acted under compulsion of state and federal statutes. The trial court concluded that Defendant's "refusal to provide service and to deal based on fear of prosecution under state law does not constitute state action" even though it found that the Defendant's "policy for not developing this type of film rests on the state obscenity laws and Defendant's fear of prosecution thereunder". (Ex 389:13-390:12.) Based on the above authorities we contend that the exact opposite conclusion must be reached even without consideration of trademark and patent grants, or the censorship activity itself.

The trial court's reliance upon cases and issues briefed by neither of the parties demonstrates great industry, but incurred the here-realized risk of improper interpretation

going unchallenged because of the inability of counsel to respond.

3.3.1.1. Adams Not Compulsion Case. The trial court cited Adams v. Southern Calif.

First Nat. Bank, 492 F.2d 324 (9th Cir. 1973) for the proposition that race discrimination cases are not applicable except in other "race" cases. We respectfully argue that the trial court's reliance thereupon for its rejection of the above authorities is misplaced for several reasons. First, the repossession by self-help in Adams was an authorized alternative, but was not compelled by state law. 11/

3.3.1.2. Compulsion Doctrine Cases Not Limited To

Race Cases. Secondly, the authorities

Plaintiffs had cited to which the trial court was responding

^{11/} In Adams the plaintiffs claimed only that state laws "encouraged" and "sanctioned" the alleged wrongdoing, not that such laws compelled the same. 492 F.2d at 328-329. At pages 330 and 334, this Court pointed out that rather than compelling the self-help repossession, the relevant statute made same only an "alternative". In discussing Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S.Ct. 1965 (1972), this Court in Adams focused on the fact that the Court in Moose Lodge found that the effect of the law there in question did not amount to "establishing or enforcing of discriminatory guest policies". 492 F.2d at 334. Moose Lodge upon which Defendant, and the Court in Adams, relied is clearly distinguishable from this There was no statute which compelled the challenged case. activity. In distinguishing Public Utilities Commission v. Pollak, 343 U.S. 451, 72 S.Ct. 813 (1952) (not a race case) in which state action was found (see analysis of Pollack in footnote 1, of dissent of Adams, supra at 340) the Supreme Court in Moose Lodge stated: "Unlike the situation in Public Utilities Commission v. Pollak, 343 U.S. 451, 72 S.Ct. 813 (1952), where the regulatory agency had affirmatively approved the practice of the regulated entity after full investigation, the Pennsylvania Liquor Control Board has neither approved nor endorsed the racially discriminatory practices of Moose Lodge." 407 U.S. at 175-176 n. 3, 92 S.Ct. at 1973. If "approval" or "endorsement" is enough for state action surely compelling the intrusion upon Plaintiff's free speech must suffice.

when this was noted during oral argument the trial court (Ex. 400:1) responded that this Circuit has rejected that decision of the 4th Circuit. This response is in error. While it is true that this Circuit has rejected one of the two bases for the decision in Doe, (i.e. that receipt of Hill-Burton funds creates state action, a rejection acknowledged in Doe) the Doe decision was based on a second ground (acknowledged by Defendant, Ex. 352:24) that the statute compelled the activity by the defendant at the risk of criminal prosecution, the exact circumstance as is here present. 529 F.2d at 638. This Court has not rejected that alternative ground, and where there are two grounds for a decision, neither is relegated to mere dictum and each have precedential value. 12/

3.3.1.3. Actual Adams Holding. Thirdly, the Adams holding was not as stated by the trial court. The sole expressions to which the trial court could possibly have been averting appear at 492 F.2d pages 329 and 333. At page 329, this Court merely expressed uncertainty as

^{12/ &}quot;Where an appellate court decision rests on two or more grounds, none can be relegated to the category of obiter dictum." Dragor Shipping Corp. v. Union Tank Car Co., 371 F.2d 722,726 (9th Cir. 1976) citing Woods v. Interstate Realty Co., 337 U.S. 535,537, 69 S.Ct. 1235 (1949). "It has long been settled that all alternative rationales for a given result have precedential value. 'It does not make a reason given for a conclusion in a case obiter dictum, because it is only one of two reasons for the same conclusion.' McLellan v. Mississippi Power and Light Co., 545 F.2d 919,925 (5th Cir. 1977) citing Richmond Screw Anchor Co. v. United States, 275 U.S. 331,340, 48 S.Ct. 194,196 (1928). "Where there are two grounds of decision upon either of which an appellate court may rest its decision and it adopts both, the ruling on neither is obiter dictum, but each is the judgment of the court and of equal validity with the other." Morehouse Manufacturing Corp. v. J. Strickland and Co., 407 F.2d 881,888 (C.C.P.A. 1969).

to whether the same test for state action applied to both equal protection and due process cases, and then it proceeded to analyze the facts as though the same "significantly involved" test set forth in these equal protection cases applied, and relied upon Supreme Court race decisions. 13/

At page 333 this Court questioned the controlling nature of race cases, but then followed same immediately by a statement in footnote 23 that "This should not result in a hierarcy of rights, or different state action tests for due process and equal protection..." 492 F.2d at 333. The Adams language to which the trial court referred was characterized as merely a "suggestion", not a holding. 492 F.2d at 341.

3.3.1.4. Limited Distinction in Adams. Fourth,
even if Adams were considered as adopting
a hierarchy of rights (as suggested by the trial court, but
rejected specifically in Adams), the only distinction from race
cases possibly drawn by Adams was not as to First Amendment
cases (as here) but rather only to an "economic due process
case" (footnote 24) where the "creditor remedies were based on
economically reasoned grounds of very long standing". 492 F.2d
at 333. The statutes here involved do not involve either
"economically reasoned grounds" nor any other grounds "of very
long standing" nor do they restate that which were "a part of
the common law" as was found in Adams. Id. at 330,333,334.

^{13/} Adickes v. S.H. Kress & Co., cited at page 330, Burton v. Wilmington Parking Authority cited at page 331, Moose Lodge No. 17 v. Irvis cited at pages 331, 332 and 334, Evans v. Abney cited at pages 331 and 336, and Griffin v. Maryland cited at page 337.

3.3.1.5. No Supreme Court Support for Hierarchy.

Fifth, even assuming that the Adams case had been intended to hold that a lesser governmental involvement is required to find state action in a race discrimination case (the "different state action tests" decried by Adams itself in footnote 23), there is no Supreme Court support for such a view, and the logic leads to a contrary conclusion as acknowledged in said footnote 23.

3.3.1.6. Conclusion Re Adams. For each of these reasons the trial court's reliance upon Adams as a basis for rejecting the cases we cited is misplaced. 14/

Reliance. The trial court next justified its refusal to follow "race" cases based on Grafton v. Brooklyn Law School, 478 F.2d 1137 (2nd Cir. 1973) and Young v. American Mini Theatres, Inc., 427 U.S. 50,96 S.Ct. 2440 (1976). (Ex. 390:13 et seq.) The trial court's reliance upon these cases is improper for each of several reasons. First again note that the Doe, supra is not a race case.

3.3.1.8. Actual Holding - Grafton. Although there is dicta from the Grafton decision suggesting the hierarchy of rights and different state action tests for different rights which this Court eschewed in Adams, the holding in Grafton dealt with the argument that the state's granting of \$400.00 for each degree the defendant awarded

 $[\]frac{14}{}$ No discussion of Adams would be complete without noting the strong dissent both by Judge Byrne, and by Judge Huffstedler from the denial of hearing en banc.

caused defendant's actions to amount to state action. To this contention the court responded: "We do not regard the \$400 payment as sufficient to carry on its back the particular constitutional rights that plaintiffs here advance." 478 F.2d at 1142. Plaintiffs' grounds for contending that state action is here involved are not remotely similar in Grafton's Claim and, therefore, the Grafton holding is not arguably pertinent.

3.3.1.9. Young - Majority. Even as stated by the trial court the most which can be drawn from the Young case is that "four members of the Supreme Court" have stated that "boarderline obscenity material is not entitled to the same panoply of protection as are other First Amendment-type materials." (Ex. 390:18 to 390:24.)

3.3.1.10. Young Not Concerned With State Action.

The <u>Young</u> case neither involved nor discussed the question of state action. In <u>Young</u> the plaintiff had challenged a land use ordinance prohibiting certain locations for new adult movie theatres. There was no issue of state action; the action was against the state. Whether Kodak's actions could be justified is a separate issue and would have no bearing upon the determination of whether state action were involved. The trial court erroneously confused two separate legal issues. <u>Young</u> never suggested that the nature of the grievance had any bearing on the issue of state action.

3.3.1.11. No Showing Of Obscenity. Since Defendant offered no evidence of the content of the confiscated pictures, the reference to borderline material is

made without any supporting evidence. $\frac{15}{}$ (N. 8 above)

also supported its finding of a lack of state action and rejection of cases we cited on the basis that the statutes under consideration in the "race" cases we cited were clearly invalid on their face. (Ex. 391:6.) This statement fails to support the conclusion of a lack of state action. First, while such statement may appear in some decision, we do not find it in Peterson, Supra, <a href="Robinson, Supra, <a href="Robinson, Supra, <a href="Robinson, Supra, Secondly, the statement does not respond to

3.3.1.12. Validity of Statutes. The trial court

^{15/} While the context of the trial court's reliance upon Young was solely with respect to its determination of an absence of state action, we note that Young is equally inapplicable to the question of the violation of First Amendment rights. First, none of the statements of the lead opinion constitute the holding of the case because the fifth justice whose concurring opinion made up the majority did not concur with those views, but rather joined in the decision upholding the ordinance as a proper land use regulation. 427 U.S. at 60 and 73, 96 S.Ct. at 2447 and 2454. Secondly, the plaintiff in Young acknowledged its being within the coverage of the ordinances, but claimed they were nonetheless vague. 427 U.S. at 59,96 S.Ct. at 2447. The Supreme Court recognized a right to challenge a statute on the grounds of vagueness even when not vague in its application to the plaintiff, but stated that this right was a limited one. It was in this context of the issue of standing that the statement to which the trial court here alluded was made, to wit: the right to assert a claim of vagueness in application on behalf of third parties is not recognized where "borderline" material is involved. As the trial court recognized, that expression did not receive majority support. n.1 427 U.S. at 73, 96 S.Ct. at 2453. Plaintiffs are not urging a position on behalf of other persons; they are asserting a claim on their own behalf, and therefore, the expression to which the trial court alluded is Amendment is dealt with, the Court in Young treated the limitation as one of time place and manner, a long recognized exception. 427 U.S. at 63, 96 S.Ct. at 2448-9. That limitation upon free speech is not here involved. Therefore, in no respect does Young support the trial court's decision. Young warned that statements regarding free speech should not be read "literally and without regard for the facts of the case in which it was made." 427 U.S. at 65, 96 S.Ct. at 2450.

<u>Doe</u>, <u>supra</u>, which does not involve race discrimination. Pinally, the issue of state action is determined by the involvement of the state, not the validity or invalidity of the statute compelling the action.

3.3.1.13. Conclusion Re Compulsion. An analysis of the Adams, Grafton, and Young cases demonstrates that none of them justify the trial court's rejection of the authorities we cited or the conclusion that as a matter of law there was an absence of state action in Defendant's refusal to return the pictures to Plaintiffs under compulsion of state and federal statutes. The suggestions that prior approval of a different application of those statutes, or the risk of prosecution, as a matter of law precludes a finding of governmental action are equally unsupportable. At a minimum Defendant's acting under compulsion of state law raises a genuine issue of governmental action.

3.3.2. State Action Arises from Trademark and Patent Grants. A second ground for contending a genuine issue of state action is that the State and federal trademark and patent rights granted to Defendant cause sufficient governmental involvement to amount to state action.

Plaintiffs' evidence is that the unique superiority of Defendant's product is a result of its ownership of numerous patents and trademarks granted by the United States and the various States. (Ex. 271-313.) Although Defendant devotes much of its evidence to support the proposition that alternative processors <u>capable</u> of equal product are available, Defendant offered no evidence either that other processors do in fact <u>produce</u> equal product (and Plaintiffs' evidence is to

the contrary) or to refute the contention that superior or otherwise, Defendant's mode of operations is attributable to patents and trademarks previously awarded to it. Similarly, while Defendant devoted four pages of argument to the contention that its trademark and patent rights granted by the government do not constitute state action (Ex. 84 et seq.), conceding along the way that this issue has never been decided by any court (Ex. 87:1), Defendant does not so much as suggest that it neither had such rights or that they did not contribute to its processing films. 16/

If involvement by reason of leasing of public property [Burton v. Wilmington Parking Authority, 365 U.S. 715,81 S.Ct. 856 (1961)] 17/ is sufficient to constitute state action, we contend that the granting of trademark and patent rights is equally sufficient.

Defendant argues that "the mere grant of a corporate charter is a ministerial government act which does not...make the latter's business...'state action'." (Ex. 84:25.) It may be true that granting corporate charters may be ministerial but granting patents is not, and Defendant's attempted analogy to

^{16/} It is Defendant's burden to show absence of state action. §3.1., above. After Plaintiffs' opposing memorandum distinguished the corporate charter-permit-license cases which Defendant attempted to analogize to its patent and trademark rights, Defendant did not even discuss the subject in its reply memorandum. (Ex. 251-254 and Ex. 350-352.)

^{17/} Courts in other circuits have also found state action from the grant of funds to assist in the construction of housing [McQueen v. Druker, 438 F.2d 781 (1st Cir. 1971)], exemption from taxation [McGlotten v. Connally, 338 F.Supp. 448 (D.C. 1972)], and the grant of funds for construction of a hospital [Simkins v. The Moses H. Cone Memorial Hospital, 323 F.2d 959 (4th Cir. 1963)].

the corporate charter cases is therefore improper. 18/ The Patent Office officers perform more than ministerial acts in reviewing a patent application, in awarding rights and powers pursuant to the Constitution, and in entering into a contract with the patentee regarding the scope and exercise of these constitutional powers. 19/

The charter - license cases cited by Defendant are further inapplicable to trademarks and patents because unlike the former, the latter are the result of a direct grant of powers and rights pursuant to the U.S. Constitution (Art. I, \$8, cl.8), are issued not for private benefit but for the public good, and in rewarding invention the rights and welfare of the community must be fairly dealt with. See Sears Roebuck

^{18/} Discretion and judgment is exercised by the officers of the Patent Office at every step in the patent procedure until such time as the bargain is struck with the patentee. Applications are subjected to extensive review to determine whether the invention meets the requisite "Novelty" and "Now-Obvious Subject Matter" criteria. 35 U.S.C. \$\$102, 103. The reviewing officer must state his reasons for rejecting an application. 35 U.S.C. \$132. If after rejection, the applicant persists in his claim, the reviewing officer must re-examine the application. 35 U.S.C. \$132. In certain circumstances holders of competing patent claims may join in these proceedings. 35 U.S.C. \$135. An applicant whose claim(s) have been twice rejected may appeal to the Board of Appeals within the Patent Office. 35 U.S.C. \$134. If still dissatisfied, an applicant may further appeal to the Court of Customs and Patent Appeals or to the District Court for the District of Columbia. 35 U.S.C. \$\$141, 145, 146.

^{19/} Jackson v. Metropolitan Edison Co., 419 U.S. 345, 95 S.Ct. 449 (1974), relied on by Defendant (Ex. 86:10) is further distinguishable first, because the Court in Jackson doubted that the state had ever granted or guaranteed the power Company a monopoly (419 U.S. at 352, 95 S.Ct. 454), whereas the grant of a patent or trademark is clearly a grant of monopoly and secondly, because the Supreme Court there asserted that the governmentally created rights must have a close relationship to the challenged authority, a fact here true. The same distinction was drawn in Taylor v. St. Vincent's Hospital, 523 F.2d 75,77 (9th Cir. 1975).

& Co. v. Stiffel, Co., 376 U.S. 225, 84 S.Ct. 784 (1964),
Griffith Rubber Mills v. Hoffar, 313 F.2d 1 (9th Cir. 1963).

While Defendant's assertion that the federal patents and trademarks are irrelevant to the second count (Ex. 84:9) is correct, Defendant overlooks that federal action is relevant to the third and fourth counts, and State trademarks support the claim of state action as to the second count.

Independently, we urge that these patents and trademarks create state action. Even were this contention in error, we contend that in combination with the compulsion of the obscenity statutes, and Defendant's acting as a censor, they cause state action to exist.

3.3.3. State Action Arises From Defendant's Exercise

of Censorship Function. Here Defendant acts
as a censor in deciding which pictures it will return to the

owners. (See nine separate affidavits filed by Defendant Commencing at Ex. 147.) One of the recognized bases for finding state action is that the act is one which has "traditionally been the function of the State." Hall v.

Garson, 430 F.2d 430,439 (5th Cir. 1970) [seizure of property to satisfy lien]; Marsh v. Alabama, 326 U.S. 501, 66 S.Ct. 276 (1946) [functions of town]; Terry v. Adams, 345 U.S. 461, 73

S.Ct. 809 (1953) and Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757 (1944) [primary elections]; North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 95 S.Ct. 719 (1975); Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983 (1972) and Sniadach v.

Family Finance Corp. of Bay View, 395 U.S. 460, 89 S.Ct. 1820 (1969) [enforcement of credit remedies].

Defendant asserts that this Court has not as yet

adopted the public function basis and that this Court so stated in Melara v. Kennedy, 541 P.2d 802 (9th Cir. 1976). (Ex. 89:21.) Yet this Court in Melara did list same as a factor (id at 802) and specifically distinguished rather than rejecting Hall v. Garson, supra, (id at 807) just as it did in Adams, supra, where it concluded that the activity involved in Hall (seizure of property after entering a private person's home) "had historically been a function of the State of Texas" while "repossession is not a state function". 492 P.2d at 336. That distinction cannot be drawn as to censorship because it too has been "historically a function of the state", a conclusion Defendant seemingly concedes. (Ex. 90:19.)

Defendant's attempts to establish as a matter of law the inapplicability of this basis for finding state action fails. First Defendant asserts that Defendant's censorship "was not formulated (a) at the request of, in cooperation with, or with the knowledge of law enforcement authorities or (b) with the intent or purpose of participating in the enforcement of the obscenity laws..." That fact was equally true in the Hall, Marsh and election cases cited above, and thus cannot be the distinguishing factor. The fact that no governmental agency asked Kodak to do what it is doing doesn't mean that Kodak's confiscation doesn't constitute state action. Formal government demand or request is not required.

Rodak's assertion that it does not act as a censor (Ex. 87:22) is belied by the true facts. Rodak reviews the pictures and transparencies and decides which ones it will return to the owner thereof. It does so on the basis of the content of the film and its evaluation of whether that content is or is not

obscene. What else could be involved in censorship?

Rodak contends that it has adopted this policy to avoid prosecution under the law. (Ex. 88:14.) Rather then negating state action the authorities (§3.3.1. above) demonstrate that same proves state action, and none of the cases suggest this as an exception to the state function test. Further Peterson, supra, and Doe, supra found state action notwithstanding risk of criminal prosecution and the former held also that the asserted motivation is not determinative once it is shown that the conduct was done pursuant to state policy or statute. Here Rodak concedes that its conduct was done pursuant to, and under compulsion of, the obscenity statutes.

Defendant's attempted distinction of the Marsh case supra on the basis that its "position would be analogous to the company town [in Marsh] only if it appeared that Rodak was an officially sanctioned censor..." (Ex. 89:8) is fallacious.

There is no holding in Marsh that the company town was officially sanctioned to bar the distribution of religious literature, and that was not the premise for the decision.

Admittedly, Kodak's practice does not totally bar

Plaintiffs' publications. There is nothing cited by Kodak to
support its conclusion (Ex. 89:16) that only if the entire
publication were barred could Kodak's actions be deemed to be
governmental action. Available alternatives do not save
infringement on free speech. (See §3.4.2.3. below.)

Defendant relies heavily on Flagg Bros., Inc. v.

Brooks, 436 U.S. 149, 98 S.Ct. 1729 (1978). That case specifically notes that the traditional governmental function basis is not limited to company town and election cases and

holds only that "settlement of disputes between debtors and creditors" does not come within that basis. 436 U.S. at 161-162,163, 98 S.Ct. at 1736, 1737.

Defendant seeks to expand the reference in <u>Plagg Bros.</u>
to "commercial transaction" to mean that there can be no state
action in commercial transaction. The relationships in <u>Adickes</u>
as well as <u>North Georgia</u>, <u>Fuentes</u>, <u>Sniadach</u>, <u>supra</u> involved as
much a commercial transaction as here. <u>Flagg Bros.</u> dealt only
with the "dispute resolving" aspect of a commercial
transaction, an aspect not here involved.

Additionally, in <u>Plagg Bros</u>. the Court (436 U.S. at 160, 98 S.Ct. at 1735) notes that the statute pursuant to which the lien rights were exercised provided for adequate remedies for improper exercise of such rights. The obscenity statutes do not provide for any such remedies, and other than this action, there is no meaningful remedy available to Plaintiffs.

Nor can the absence of a State employee in the litigation be treated as the vital distinguising factor. No State official was a party in Adickes, or Doe, supra, or in McQueen v. Druker, 438 F.2d 781 (1st Cir. 1971), Simkins v. The Moses H. Cone Memorial Hospital, 323 F.2d 959 (4th Cir. 1963) or McGlotten v. Connally, 338 F.Supp. 448 (D.C. 1972).

Perhaps the most vital distinction of <u>Flagg Bros.</u> is demonstrated by its discussion of <u>Adickes</u>, <u>supra</u>:

*Our cases state 'that a State is responsible for the... act of a private party when the State, by its law, has compelled the act.' Adickes, supra, [citation]. This Court, however, has never held that a State's mere acquiescence in a private action converts that into that of the State...

"Here, the state of New York has not compelled the sale of a bailor's goods, but has merely announced the

circumstances under which its courts will not interfere with a private sale." 436 U.S. at 164-166, 98 S.Ct. at 1737-1738. (Emphasis added.)

Here there is not merely "acquiescence". Rodak contends that it is acting to avoid prosecution under the statutes and if one accepts Kodak's application, then in every meaningful way those statutes compel Kodak's confiscation policy. That element wholly distinguishes this case from the Flagg and other cases upon which Kodak relies.

The trial court's findings and conclusions do not discuss this basis either individually or as an element along with the other bases herein discussed.

3.4. DEFENDANT DID NOT PROVE ABSENCE OF JUSTICIABLE

CONTROVERSY FOR DECLARATORY RELIEF. Defendant's position regarding the fourth count (Ex. 54:20) would force Plaintiffs to incur the enormous risks and injury which arise when Plaintiffs submit film to Defendant and then the transparencies are not returned, and to file repeated lawsuits seeking the mere return of these by then stale transparencies. An action for mere possession would be fruitless in that by the time transparencies are returned they would be of little, if any, value. (Ex. 273:7-284:4.) Declaratory relief is the proper means of obtaining a definitive adjudication of rights, thereby avoiding litigation each time a wrong is committed. See Roe v. Wade, 410 U.S. 113,126, 93 S.Ct. 705,713 (1973); Doe v. Charleston Area Medical Center, Inc., 529 F.2d 638,644 (4th Cir. 1975). This case presents a classic example of an action "capable of repetition, yet evading review". Roe v. Wade, supra, 410 U.S. at 125.

According to Defendant, application of \$§311.2 and

1461-5 requires it to act as a censor to determine which pictures may legally be returned to Plaintiffs. Plaintiffs contend that if such statutes so require, then they violate Plaintiffs' First and Fourteenth Amendment rights and a declaration of the invalidity of such application should be made. Especially is this necessary if Plaintiffs are denied relief under the second and third counts.

3.4.1. There Is Justiciable Case. The trial court's granting the summary judgment motion on the declaratory relief (28 U.S.C. §2201) count was based on the conclusion that "there is no case or controversy" (Ex. 392:19) but rather this was "a collusive action" (Ex. 393:5) because "Rodak tells us it has no interest in upholding either set of laws" (Ex. 392:25). The authorities cited not only by Defendant, but also by the trial court, as support for reaching this conclusion as a matter of law are inapplicable, in that each is premised on a finding of a collusive action or moot case. Typical is the statement from Moore v. Charlotte-Mecklenburg Board of Education, 402 U.S. 47,48, 91 S.Ct. 1292,1293 (1971) quoted in Defendant's moving papers (Ex. 94:28) that "We are thus confronted with the anomaly that both litigants desire precisely the same result... There is surely not one shred of evidence or argument by Defendant that it joins, or is in collusion, with Plaintiffs in their attack on the validity of the application of the laws here in question. To the contrary, Defendant's Answer and Motion for Summary Judgment prove adversity. Avoidance of collusion is assured by 28 U.S.C. \$2403. The trial court's conclusion that this would be "a collusive action" is in error.

The trial court relied upon <u>U.S. v. Johnson</u>, 319 U.S. 302, 63 S.Ct. 1075 (1943) and <u>Rutolo v. Rutolo</u>, 572 F.2d 336 (1st Cir. 1978). (Ex. 393:24.) In <u>Johnson</u> the landlord defended a tenant's action on the ground that the Emergency Price Control Act of 1942 was unconstitutional, and the Supreme Court upheld the government's claim of collusion in a motion to reopen the case. 28 U.S.C. §2403 protects against this risk, and there is no evidence of collusion here.

In Ruotolo, supra, a creditor moved to disqualify a retired bankruptcy referee from serving as attorney for the debtor in possession. After denial of the motion the government intervened, following which the creditor withdrew its objection, and the retired referee ceased to represent the debtor. Nonetheless the government appealed the denial of the disqualification motion. The Court of Appeals held that the matter had become moot and that there remained no justiciable issue by reason thereof. Further the Court found that for the government to proceed it had to have an independent basis, and that once the parties had resolved their differences, the government had no such basis, and further that its decision would merely be an advisory opinion. None of the facts in Ruotolo are even tangently similar to those here and the decision in no way supports a conclusion that there is not a dispute requiring declaratory relief in this case. $\frac{20}{}$

^{20/} The other authorities cited by Defendant are equally inapplicable. In Golden v. Zwickler, 394 U.S. 103, 89 S.Ct. 956 (1969), the Supreme Court found that the case or controversy had become moot. In Mendez v. Heller, 530 F.2d. 457 (2d Cir. 1976), the plaintiff sought to challenge a New York two year residency requirement prior to actually having attempted to file for divorce in the appropriate (Cont'd)

While Defendant argues that there is a lack of concrete adverseness (Ex. 91:25), that there is a lack of substantial controversy between the parties (Ex. 92:2) and that it has no interest in defending the constitutionality of the challenged laws (Ex. 93:16), in virtually the next breath, however, Defendant concedes that it "is only interested in obeying the laws as they exist".

Isn't adversity proved by Defendant's Answer and the manner in which it has pursued this case? If Kodak had no interest in defending the constitutionality of the statutes and if all it wanted to do was be secure against possible prosecution, why did it answer the fourth count?

3.4.2. Prior Determinations - Tracking. The trial court stated that these statutes have been "adjudicated as valid in criminal cases and other contexts" (Ex. 392:11.) and that the state and federal statutes of which "Kodak is concerned" "track the decisions of the Supreme Court." (Ex. 391:12.) While the statutes may "track", the application by Kodak does not. Here Defendant claims the compelled application of the statutes requires its prior

^{20/ (}Cont'd) New York State Courts. The courts are more ready to review threatened deprivations of First Amendment Rights than in other situations. Zwickler v. Koota, 389 U.S. 241,254,88 S.Ct. 391,399 (1967); Wolff v. Selective Service Local Board No. 16, 372 F.2d 817 (2nd Cir. 1967). In contrast to the situation in Mendez, all possible events have occurred to create an actual dispute between the parties. Plaintiffs have tendered film for processing to defendant and defendant has refused to return the films to Plaintiffs. Thus, the "exigent adversity" mentioned in Mendez exists. Finally, the contention that Granfield v. Catholic University of America, 530 F.2d 1035 (D.C. Cir. 1976) (Def.Br. 68:1) requires the joinder of representatives of the bodies enacting the statutes is in error as demonstrated by other cases cited by Defendant itself.

restraint of free speech in the pre-editorial process which the authorities state is improper. No case has yet upheld a statute's compelling a private person to interfere with free speech before publication or that these statutes should be so interpreted, and the censorship cases require procedural due process which the application Kodak claims is compelled would violate. Kodak's assertedly compelled application of the statutes fails to "track", or comply with, the authorities in five separate respects: (1) prior restraint at a pre-publication editorial stage is unconstitutional, (2) the pictures in pre-publication are not legally capable of being tested for obscenity, (3) Plaintiffs' magazine must be judged as a whole and not merely pictures therefrom, (4) the Kodak tests applied do not comport with the constitutional requirements and (5) Plaintiffs' have not been afforded the procedural due process required for censorship.

3.4.2.1. Censorship Limitations - Prior Restraint.

"We must start from the recognition that the films were presumptively protected by the First Amendment. Roaden v. Kentucky, 413 U.S. 496, 93 S.Ct. 2796 (1973). Since seizure of First Amendment-protected materials constitutes a form of prior restraint, the materials are entitled to special treatment..." United States v. Tupler, 564 F.2d 1294,1297 (9th Cir. 1977).

Defendant's policy of confiscation directly affects and threatens Plaintiffs' freedom of speech and press by precluding its expression. This constitutes a prior restraint of speech, for which the Supreme Court has acknowledged a deep distaste and which "comes to this Court bearing a heavy presumption against its constitutional validity." Bantam Books, Inc. v. Sullivan, 372 U.S. 58,70 83 S.Ct. 631,639 (1963) later quoted in New York Times Company v. U.S., 403 U.S. 713,714, 91 S.Ct.

2140,2141 (1971). See also <u>Southeastern Promotions</u>, <u>Ltd. v.</u>

<u>Conrad</u>, 420 U.S. 546,553-554 95 S.Ct. 1239,1244 (1975) and

Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900 (1940).

If Kodak is required by these statutes to confiscate films, then these statutes would impose the same evil which was struck down in the above cases. Plaintiffs' freedom of speech is subjected to "appraisal of facts, the exercise of judgment, and the formation of an opinion" by Kodak at the direction of the government, factors which characterize censorship. See Southeastern, supra, 420 U.S. at 558-9, 95 S.Ct. at 1246-7, in which the Court additionally stated:

"It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable."

Here the evidence shows that not only is it "difficult to know in advance what" Plaintiffs magazines will say or depict, its impossible.

In Near v. State of Minnesota, 283 U.S. 697,721, 51

S.Ct. 625,633 (1931) the Supreme Court struck down a statute
"authorizing suppression" of materials. Here application of
the statutes according to Defendant requires it to suppress the
transparencies. The Court there stated that it was irrelevant
whether the restraint was directly by the legislature or only
indirectly. In Near the asserted justification for the prior
restraint was the injury suffered from libelous publications.
In this case the alleged injury is the publication of
obscenity. Substituting obscenity for libel, the rule to be
drawn from Near is (bracketed portions representing such
substitutions):

"The recognition of authority to impose previous restraint upon publication in order to protect the community against the circulation of [obscene matter] necessarily would carry with it the admission of the authority of the censor against which the constitutional barrier was erected. The preliminary freedom, by virtue of the very reason for its existence, does not depend, as this court has said, on proof of [non-obscenity]. [citation.]

"Equally unavailing is the insistence that the statute is designed to prevent the circulation of [obscenity] which [is undesireable]. [T]he theory of the constitutional guarantee is that even a more serious public evil would be caused by authority to prevent publication."

The rule of Near applies in the case of disputes between private parties as it does in disputes between the government and a private party (Organization For A Better Austin v. Keefe, 402 U.S. 415,418, 91 S.Ct. 1575,1577 (1971) and Goldblum v. National Broadcasting Corp., 584 F.2nd 904,907 (9th Cir. 1979)], and freedom of speech and press applies to commercial as well as non-commercial speech (New York Times Company v. Sullivan, 376 U.S. 254,256, 84 S.Ct. 710,713 (1964) and Quinn v. Aetna Life & Cas. Co., 616 F.2d 38 (2nd Cir. 1980)].

The obscene content of films would not justify prior restraint. In <u>Southeastern</u>, <u>supra</u>, the plaintiff was denied the right to use public property to put on a live performance of a musical play. The lower court found the play to be obscene. The Plaintiff raised three arguments: (1) that the Defendant's refusal was an unlawful prior restraint, (2) that the wrong test of obscenity was applied and (3) that the record did not support the finding of obscenity. The Supreme Court responded: "We do not reach the latter two contentions, for we agree with the first." 420 U.S. at 552, 95 S.Ct. at 1243. Thus the Court declared the defendant's conduct was

unconstitutional <u>reqardless</u> of whether the play was obscene.

Once a prior restraint was found, the nature of the speech became insignificant.

Similarly, the nature of the transparencies here should be irrelevant. What the State cannot do directly it cannot do through the back door. If, as Kodak contends, it faces a risk of prosecution, then the statute which directs Kodak to engage in prior restraint must be declared unconstitutional in its application to a film processor, and Kodak's practices done to aid such prior restraint must be enjoined.

3.4.2.2. Pre-Publication Material Cannot Be

Censored. Plaintiffs and Defendant agree that the film sent to Defendant by or for Plaintiffs is merely an early intermediate step in the process of Plaintiffs' publishing their magazines. (\$2.4. above.) Defendant's threatened and actual confiscation of film directly intereferes with the Plaintiffs' editorial process and freedom of press by denying Plaintiffs films which they might use, and therefore, requires their use of other transparencies and inferior quality. Application of the statutes as asserted by Defendant requires it to enter the composing room of Plaintiffs to give directives as to the content of expression by Plaintiffs. On the alleged basis of federal and state laws, Defendant has therefore created its own prior restraint upon Plaintiffs' speech. The law with respect to such activity is well-stated in Goldblum, supra, 584 F.2d at 907:

"It is a fundamental principle of the first amendment that the press may not be required to justify or defend what it prints or says until after the expression has taken place. The Government has been prohibited from interfering with the editorial process by entering the composing room to give directives as to the content of expression. The district court proceedings here intervened in the editorial process by ordering an official of the broadcasting company to produce a film just before its scheduled broadcast so that it could be examined for inaccuracies. A procedure thus aimed toward prepublication censorship is an inherent threat to expression, one that chills speech. (Emphasis added and citations omitted.)

In <u>Goldblum</u> the challenged order did not prevent or preclude publication. Rather it merely required divulgence to the court before publication. Nonetheless the order was reversed (within twenty-four hours). How much worse is Defendant's position here when its practice has resulted not only in chilling free speech but also in actual prevention of publication of the materials it has undertaken to censor.

"The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the Pirst Amendment." Pittsburgh Press Co. v. Pittsburgh Com'n on Human Rel., 413 U.S. 376,390, 93 S.Ct. 2553,2561 (1973). (Emphasis added.)

Because of the assertedly compelled application of the statutes, Defendant exercises "excessive caution" resulting in Plaintiffs loss of their freedom of speech. In <u>Baggett v. Bullitt</u>, 377 U.S. 360,372,84 S.Ct. 1316,1323 (1964) the Supreme Court struck down a statute creating a prior restraint because it forced "[t]hose... sensitive to the perils posed by [the statute to] avoid the risk... by restricting their conduct to that which is unquestionable safe. Free speech may not be so inhibited."

In reversing a \$311.2 conviction the court in <u>In Re</u>
<u>Klor</u>, 64 Cal.2d 816,820,821 (1966) stated:

"Without the requirement that the defendant be shown to have prepared the material with intent to distribute it in its obscene form, the statute would apply to matter

produced solely for the personal enjoyment of the creator or as a means for the improvement of his artistic technique. Such a statute would approach an interdiction of individual expression in violation of the First and Fourteenth Amendments. (See Griswold v. Connecticut (1965) 381 U.S. 479, 482 [85 S.Ct. 1678]; American Communications Assn. v. Douds (1950) 339 U.S. 382,412 [70 S.Ct. 674].)

"Nor does such conduct occur if the creator intends to purge the material of any objectionable element before distributing or exhibiting it. To hold otherwise would pose grave technical difficulties for the unconventional artist and would, because of the risk of criminal sanctions, tend to suppress experimental and tentative productions that might become, in finished form, constitutionally protected communication. '... [T]he Fourteenth Amendment requires that regulation by the States of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line.' (Bantam Books, Inc. v. Sullivan (1963) 372 U.S. 58,66 [83 S.Ct. 631].)"

3.4.2.3. Available Alternative Means of Publication Will Not Save A Prior

Restraint. The evidence shows a conflict as to whether alternatives are available to Plaintiffs. However, even were alternatives proved as a matter of law, it would not establish the absence of genuine issue of state action.

"Whether petitioner might have used some other, privately owned, theater in the city for the production is of no consequence. There is reason to doubt on this record whether any other facility would have served as well as these, since none apparently had the seating capacity, acoustical features, stage equipment, and electrical service that the show required. Even if a privately owned forum had been available, that fact alone would not justify an otherwise impermissible prior restraint.

'[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.' Schneider v. State 308 U.S., at 163, 60 S.Ct., at 151."

Southeastern, supra, 120 U.S. at 556, 95 S.Ct. at 1245.

If appropriate alternative theaters could not save the prior restraint in <u>Southeastern</u>, then alternative processors cannot save Rodak's prior restraint.

3.4.2.4. Must Consider Finished Whole Magazine.

Here Kodak at best is judging pictures which may or may not be included in a magazine and is not considering the entire magazine, because of course it can't. Such application of a statute is unconstitutional.

"[A]ppellant would view each separate article and pictorial presentation, to determine whether each 'work' in a 'volume' is obscene under the Miller test. We conclude that decisions of both the Supreme Court and this court require us to treat each magazine as a separate work that is to be taken as a whole." Penthouse Intern., Ltd. v. McAuliffe, 610 F.2d 1353,1366-1367 (5th Cir. 1980).

If it is improper to view only entire articles, how much more so to view merely pictures from such articles.

In <u>United States v. Tupler</u>, <u>supra</u> the convictions were reversed because the search warrant did not meet constitutional requirements. The court there stated:

"The affidavit upon which the warrant was based described in some detail the photographic labels which were fixed to the film boxes... These labels did not necessarily bear any relationship to the content of the films...

"First Amendment standards require that any determination of obscenity be made considering the <u>material as a</u> whole...

"A single photographic print or 'out take' from a roll of motion picture film... could never establish probable cause to believe that the film 'taken as a whole, lacks serious literary, artistic, political, or scientific value.' 564 F.2d at 1297. (Emphasis added.)

If a single "out take" cannot establish the obscenity of a motion picture, then surely a single picture which may never be used in a magazine cannot establish that the magazine "taken as a whole, lacks serious literary, artistic, political, or scientific value."

These cases follow the statements of Judge Hand in

U.S. v. One Book Entitled Ulysses, 72 F.2d 705,707 (2nd Cir. 1934) holding that the publication must be "taken as a whole".

Judge Hand quoted from a prior decision of Judge Andrews in Halsey v. New York Society for Suppression of Vice, 234 N.Y. 1, 136 N.E. 219 as follows:

"In referring to the obscene passages, he remarked that:
'No work may be judged from a selection of such
paragraphs alone. Printed by themselves they might, as a
matter of law, come within the prohibition of the
statute. So might a similar selection from Aristophanes
or Chaucer or Boccaccio, or even from the Bible. The
book, however, must be considered broadly, as a whole.'
We think Judge Andrews was clearly right, and that the
effect of the book as a whole is the test."

Nor may reference be made to prior publications of Plaintiffs. A restraint which "operates to suppress, on the basis of previous publications" is unconstitutional.

Organization For A Better Austin v. Keefe, 402 U.S. 415,418, 91

S.Ct. 1575,1577 (1971). (Emphasis added) (See also n. 8 above.)

3.4.2.5. <u>Kodak's Policy Does Not "Track"</u>. The standard for obscenity established in Miller v. California, 413 U.S. 15,25, 93 S.Ct. 2607,2615 (1973) is a three-pronged test including:

"(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." 413 U.S. at 25, 93 S.Ct. at 2615. (Emphasis added, citations omitted.)

As discussed under \$\$3.4.2.2. and 3.4.2.4. above, the transparencies are (if used at all) substantially altered prior to appearance in Plaintiffs' magazines. Textual material is also added. Yet, as noted, Defendant's assertedly compelled application of the statutes (Ex. 106-7) does not purport to

consider the whole magazine, thereby failing to comply with prongs (a) and (c) of this conjunctive test. Nor does

Defendant's policy require depiction in a "patently offensive way" so as to meet the second prong. Kodak's policy (Ex. 106-7) does not "track" the case requirements for finding obscenity as to any of the three tests.

3.4.2.6. Procedural Due Process. Courts have imposed a substantial set of due process requirements upon censors. See Preedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734 (1965); United States v. Thirty Seven (37) Photographs, 402 U.S. 363, 91 S.Ct. 1400 (1971); Blount v. Rizzi, 400 U.S. 410, 91 S.Ct. 423 (1971); Southeastern Promotions, supra, Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 88 S.Ct. 1298 (1968).

The basic due process requirements can be summarized as follows: (1) the standard for determining whether a work is obscene must comply with constitutional standards of obscenity and may not be vague, overly broad or imprecise; (2) the burden of proving that the work is unprotected expression must rest on the censor; (3) the censor, within a specified brief period, either issue a license or go to court to restrain the use of the allegedly obscene material; (4) any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to the preservation of the status quo for the shortest fixed period compatible with sound judicial resolution; (5) the censorship procedure must also assure a prompt final judicial decision to minimize the deterent effect of an interim and possibly an erroneous denial of a license.

Preedman, supra, 380 U.S. at 58-59; 85 S.Ct. at 739.

Interstate Circuit, supra, 390 U.S. at 684-689; 88 S.Ct. at 1303-1306.

Kodak has complied with none of the foregoing and Plaintiffs have been afforded none of the foregoing rights.

"There must be some judicial determination of obscenity before a seizure or 'constructive seizure' may occur." Penthouse, supra, 610 P.2d at 1359.

3.4.3. Conclusion Re Declaration Relief. For each of the foregoing reasons, Defendant's argument that as a matter of law declaratory relief should not be allowed is in error.

3.5. DEFENDANT HAS NO PRIVILEGE. Defendant complains (Ex. 351) and the trial court comments (Ex. 400:9) that were Defendant to return the pictures to Plaintiff Defendant would risk being accused of violating \$\$311.2 and 1461-5, and therefore the Defendant had what amounts to a "privilege" (Ex. 391:24).21/ If the trial court's suggestion

^{21/} Defendant's conclusion that "transportation of unedited obscene film in interstate commerce is a federal offense" (Ex. 354:26) relying upon <u>United States v. Levine 546 F.2d</u> 658.667 (5th Cir. 1977) is incorect for at least two reasons: Pirst, the film transported in <u>Levine</u> was a "work print". Since the court accepted the final "release print" as evidence of the work print which the defendant had shipped, it is clear that the print which defendant did ship was a complete motion picture. It was not an unedited version. That must be contrasted with the facts shown here that it is highly unlikely that any particular picture that Defendant censors by refusing to return same would ever end up in a distributed magazine. Secondly, Levine at page 668 specifically states that "whether a motion picture film is obscene must be adjudged upon viewing it in its entirety." That is completely opposite to the contention that an unedited version can be legally the subject matter. Defendant's contention that prosecution of a film lab employee has already been determined as proper based upon Gold v. United States, 378 F.2d 588 (9th Cir. 1967) (Ex. 351) is in error. The participation by the defendant in Gold was far more then merely returning developed film. Additionally the film in Gold was a completed motion picture, not merely an intermediate step in the publication of a magazine.

of privilege is made to avoid "state action", then it was in error. Whether Defendant's past conduct is to be condoned because of a legimitate fear of prosecution under state and federal laws, does not negate a finding of state action as Defendant has contended and as the trial court has suggested (Ex. 88:14 and 390:9), but rather supports a finding of state action. Peterson v. City of Greensville, and Doe v. Charleston, Etc., supra. 22/

If the contention is made (although not so stated in moving papers) to show an excuse for Defendant's violating Plaintiff's right of free speech, then if it be accepted, the only logical conclusion is to permit Plaintiffs to proceed in their attack on such an application of those sections. Surely the result cannot be that the government may do indirectly that which it could not do directly. Yet, if application of the statutes results in the censorship of Plaintiffs' speech in this manner, it indirectly constitutes an unconstitutional infringement upon Plaintiffs' right of free speech.

If Defendant is to be immunized against claims under the second and third counts because of the application of certain federal and state laws, then surely Plaintiffs are entitled to their day in court to demonstrate that such laws cannot legally be so applied. On the other hand, if such laws cannot be challanged by attacking their application in this

^{22/} Defendant's reliance upon Associates & Aldrich Company v.

Times Mirror Company, 440 F.2d 133 (9th Cir 1971) and Avins v. Rutgers State University of New Jersey, 385 F.2d 151 (3rd Cir. 1967) (Ex. 356-358) is misplaced. Neither decision suggests that the defendant's practice in those cases was the direct result of a fear of prosecution under any law, or was a practice adopted to censor certain speech.

manner, then Plaintiffs must be permitted to seek relief by reason of such application. Defendant cannot have it both ways so as to deprive Plaintiffs of any meaningful remedy.

The uncontradicted evidence (Ex. 274-284) is clear that the remedy of obtaining pictures through a replevin action is virtually worthless. Defendant offers no evidence to refute same. The trial court's decision would enhance a "Catch-22" result (rather than avoid it as contended by Defendant, Ex. 351:17), to wit: Defendant is entitled to act as a censor by reason of the threat of state and federal laws without following the requirements set down by the case law applicable to censorship, and Plaintiffs are denied the right to obtain a declaration that such application of those laws is improper.

3.6. PLAINTIFFS DID NOT WAIVE CLAIMS. At Ex. 55-56 of its brief, Defendant argues that it is not obligated to return material depicting matters described in its notice because that notice constituted part of a contract between defendant and plaintiffs. The trial court inquired into this subject (Ex. 397:14) and we therefore discuss it.

3.6.1. Plaintiffs Did Not Agree To Kodak's Policy.

Paragraph 21 of Robert DeMarco's opposing affidavit (Ex. 299) states quite clearly that Plaintiffs never agreed to Defendant's confiscation policy. At a minimum, this raises a genuine issue of fact. Kodak contends that Plaintiffs are bound by Ex. 112 but there is no evidence even suggesting that it was ever presented to, or known by, Plaintiffs.

3.6.2. There Is No Waiver Prom Kodak's Notice.

"[Waiver] is a voluntary act and implies an abandonment of a right or privilege--an election to dispense with something of value or to forego some advantage which one might, at his option, have demanded. In no case will a waiver be presumed or implied contrary to the intention of the party whose rights would be injuriously affected thereby, unless by his conduct the opposite party has been misled, to his prejudice, into the honest belief that such waiver was intended or consented to." Chase v. National Indemnity Co., 129 Cal.App.2d 853,858 (1954).

3.6.3. Contract of Adhesion Is Not Enforceable.

There is a genuine issue of fact as to whether or not the notice could be enforced even if it constituted a waiver. Assuming the notices formed a contract, it was one of adhesion. Even unambiguous provisions of a contract of adhesion will not be strictly enforced if they result in unreasonable, unjust, or unconscionable forfeitures or absurd results. See Schilk v. Benefit Trust Life Insurance Co., 273 Cal.App.2d 302 (1969); Steven v. Fidelity and Casualty Co., 58 Cal.2d 862 (1962); Cal.Civ.Code, \$1670.5.

All the elements of an adhesion contract are present in this case. 23/ Kodak presents its terms and conditions for accepting material for processing in a standardized printed form which has been prepared by it. Kodak clearly is in a superior bargaining position to that of Plaintiffs or at least this is a genuine issue of fact. As Kodak itself contends, it will not accept material for processing unless customers comply

^{23/} The basic criteria for determining whether a contract is an adhesion contract include: (i) a contract presented in a standardize form; (ii) prepared by the party with superior bargaining power; (iii) due to such disparity and bargaining power the contract must be accepted or rejected on a "take-it-or-leave-it" basis by the weaker party; (iv) there is no realistic opportunity to bargain over terms; and (v) often arises in situations where the party preparing the contract has a monopoly (natural or artificial) in the desired goods or services. See Blair v. Pitchess, 5 Cal.3d 258,275-276 (1971); Adams v. Egley, 338 F. Supp. 614,620 (S.D.Cal. 1972); Wheeler v. St. Joseph's Hospital, 63 Cal.App.3d 345,356 (1976).

with its terms. Kodak's overwhelming position in the market for superior quality photofinishing and whether Plaintiffs must utilize the services of Kodak are clearly in dispute. As an adhesion contract, the contract between Kodak and plaintiffs would be subject to construction by the court. All ambiguities or questions pertaining to the impact and effect of various clauses would be construed against Kodak.

3.6.4. First Amendment Rights Are Not Waiveable.

Speech are interests of society as a whole and cannot be waived, and even as to non-Pirst Amendment rights, every reasonable presumption against waiver of fundamental constitutional rights must be made and such rights cannot be waived in a contract of adhesion and any waiver must be clear. 24/ Thus, in Fuentes, supra, the Supreme Court declared that the Florida and Pennsylvania pre-judgment replevin statutes were unconstitutional even though the debtor had agreed in writing that the seller could take back the merchandise in the event of default. There is clearly no language within the Kodak notice by which Plaintiffs purport to waive their constitutional rights. Plaintiffs received nothing additional from Kodak in consideration of the purported waiver

^{24/} Abington T.P. Pa. School District v. Shempp, 374 U.S. 203,224-5, 83 S.Ct. 1560 (1963); Johnson v. Sanders, 319 F.Supp. 421, (D.C.Conn. 1970), aff'd 403 U.S. 955, 91 S.Ct. 2292 (1971); Fuentes v. Shevin, 407 U.S. 67,95, 92 S.Ct. 1983,2001-2002 (1972), Adams v. Egley, 338 F.Supp. 614,620 (S.D.Cal. 1972) and Blair v. Pitchess, 5 Cal.3d 258,274-276 (1971).

of these rights. $\frac{25}{}$

- 3.6.5. Conclusion Regarding Waiver. For each of the foregoing reasons, there are genuine issues of fact as to whether or not Kodak's notice could or did constitute a waiver of constitutional or other rights

 Plaintiffs had to their property and to publish the transparencies which Kodak has confiscated.
- 3.7. MOTION PREMATURE. Summary judgment should not be granted until such time as the party opposing the motion has had an adequate opportunity to conduct discovery.26/ The foregoing rule is particularly true in situations where the facts necessary to oppose the motion are in the possession of the moving party, and here Defendant asserts its subjective intent is a material issue. Defendant's motion herein was made within a few days after counsel for the parties first met to discuss discovery and before any discovery had been taken. Thus, Defendant's motion was premature, and should therefore have been denied.
- 4. CONCLUSION RELIEF REQUESTED. Kodak by virtue of its trademark and patent grants has by reason of application of obscenity laws injected itself into the editorial process of Plaintiffs' publications, as a censor. In

^{25/} Whether the material tendered by plaintiffs to Kodak for processing falls within the ambit of the material identified in Kodak's notice is still an open question.

^{26/} Rule 56(f) of the Federal Rules of Civil Procedure. See
also Hospital Building Co. v. Trustees of Rex Hospital, 425
U.S. 738, 96 S.Ct. 1848 (1976); Poller v. Columbia Broadcasting
System, Inc. 368 U.S. 464, 82 S.Ct. 486 7 L.Ed. 2d 458 (1962);
Timberlane Lumber Co. v. Bank of America N.T.S.&A. 549 F.2d 597
(9th Cir. 1976); Illinois State Employees Union Council 34 Etc.
v. Lewis 473 F.2d 561,565 n.8 (7th Cir. 1972).

so doing Defendant has acted under color of law: an absence of State action cannot be declared as a matter of law. This application of obscenity statutes, improperly places at risk those uninvolved with the publication itself resulting in Rodak's redefining obscenity in a manner never approved by any court, setting itself up as a censor to review without any court intervention the content of proposed photographs, confiscating those photographs it deems obscene and asserting it must do so under compulsion of law. Pursuing a declaration of the unconstitutionality of such application must be permitted. Plaintiffs cannot be relegated to a valueless common law action for return of stale pictures when it is the very existence of these laws whose application violates Plaintiffs' freedom of speech and press. While we contend the state action element has been proved as a matter of law, for purposes of this appeal we need only show that the trial court's decision, that as a matter of law there is an absence of state action, is in error. We pray that the judgment be reversed so as to reinstate the second, third and fourth counts.

DATED: March 31, 1982

Respectfully submitted,
RICHARD D. AGAY for
COOPER, EPSTEIN & HUREWITZ, APC
Attorneys for Appellants

(Excerpts under separate cover)

Nos. 80-5861 & 80-6077 IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HUSTLER MAGAZINE, INC., a corporation and CHIC MAGAZINE, INC., a corporation,

Plaintiffs-Appellants,

VS.

EASTMAN KODAK COMPANY, a corporation,

Defendant-Appellee.

APPELLEE'S BRIEF.

ISSUES PRESENTED FOR REVIEW.

- 1. Whether the district court correctly concluded that the policies and practices of Kodak of which plaintiffs complain constitute private action rather than state or governmental action within the meaning of 42 U.S.C. §1983 and the First and Fourteenth Amendments to the United States Constitution.
- 2. Whether the district court correctly concluded that the plaintiffs' claim against Kodak for declaratory relief as to the constitutionality of certain federal and state obscenity statutes lacks the concrete adverseness necessary to create a justiciable controversy within the meaning of the United States Constitution and the Federal Declaratory Judgment Act.

STATEMENT OF THE CASE.

A. Procedural History.

Plaintiffs, publishers of Hustler and Chic Magazines. commenced this action February 13, 1980 by filing a complaint in the court below seeking injunctive relief, damages

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and a declaratory judgment. (EX 1-11.)2 Plaintiffs alleged that defendant Kodak's policy and practice of refusing to return to its customers sexually explicit film and pictures developed therefrom (hereinafter referred to, collectively, as "sexually explicit pictures") violates the federal antitrust laws (first claim for relief), deprives plaintiffs of their right to freedom of speech in violation of 42 U.S.C. §1983 (second claim for relief), and deprives plaintiffs of rights protected by the First and Fourteenth Amendments (third claim for relief). Plaintiffs also alleged that they are entitled to a declaratory judgment against Kodak that certain state and federal obscenity statutes are unconstitutional (fourth claim for relief). On June 9, 1980, Kodak moved for summary judgment on the grounds that the case presents no genuine issue of material fact and that defendant is entitled to judgment as a matter of law, supporting its motion by affidavits. Plaintiffs opposed the motion, filing affidavits in support of their opposition.

On September 22, 1980, the district court, after hearing, announced its decision granting Kodak's motion for summary judgment as to the plaintiffs' second, third and fourth claims for relief and dismissing the first claim for failure to state a claim upon which relief can be granted, with leave to amend within ten days. (EX 360-403.) The district court reduced its order to writing and el.:ered it in the docket on

²Items of the clerk's record will be cited to herein by parenthetical reference to page numbers of the excerpts prepared by the Appellants, followed where appropriate by internal line numbers (e.g., "(EX 19: 25-27)").

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^{&#}x27;On February 13, 1980 plaintiffs also filed action no. C313377 in the Superior Court of the State of California for the County of Los Angeles against Kodak and Doe defendants alleging wrongful possession and detention by Kodak of color film transparencies belonging to plaintiffs and seeking similar injunctive and declaratory relief under state laws as that sought in the instant action. Kodak answered the complaint in the state court action and that case is presently at issue.

September 30, 1980. (EX 407-10.) Plaintiffs failed to file an amended complaint as to the first claim for relief within the time allowed. Consequently, on November 14, 1980, final judgment was entered in favor of Kodak. (EX 412-14.)

B. Ninth Circuit Court of Appeals' Rule 13(b).

1. District Court's Subject Matter Jurisdiction.

Plaintiffs' asserted basis for federal subject matter jurisdiction in the district court over the antitrust claims alleged in the first count of the complaint is 28 U.S.C. §1337(a) and 15 U.S.C. §§15 and 26. (EX 2: 4-6.)

Plaintiffs' asserted basis for federal subject matter jurisdiction in the district court over the second count of the complaint alleging deprivation of civil rights under color of state law pursuant to 42 U.S.C. §1983 is 28 U.S.C. §1343(3). (EX 5: 25-27.)

Plaintiffs' asserted basis for federal subject matter jurisdiction in the district court over the third count of the complaint alleging deprivation of federal constitutional rights is 28 U.S.C. §1331. (EX 7: 22-24.) However, the district court held that plaintiffs' second and third claims do not involve sufficient governmental involvement to constitute claims within the court's federal subject matter jurisdiction.

Plaintiffs' asserted basis for federal subject matter jurisdiction in the district court over the fourth count of the complaint seeking declaratory relief is 28 U.S.C. §1331. (EX 8: 28.) However, the district court held that this count lacked the concrete adverseness, as between plaintiffs and Kodak, necessary to create a justiciable actual controversy

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within the meaning of the Declaratory Judgment Act (28 U.S.C. §2201) and article III, section 2, clause 1 of the United States Constitution. (EX 392-94.)

2. Jurisdiction in the Court of Appeals.

Kodak agrees with the statement of plaintiffs (AOB 4).

3. District Court's Judgment Is Appealable.

Kodak agrees with the statement of plaintiffs (AOB 3).,

4. The Appeal Is Timely.

Kodak agrees with the statement of plaintiffs (AOB 3-4).

C. Statement of Relevant Facts.

The facts relevant to this appeal, as shown by the parties' pleadings and the affidavits they have filed, are undisputed. Plaintiffs, publishers of magazines which include sexually explicit material, are subsidiaries of Larry Flynt Publications, Inc. (EX 384: 3-12; 272: 10-12.) Kodak is a private corporation which markets various kinds of photographic film, operates ten film processing laboratories nationwide dealing with the general public, and provides processing chemicals and technical assistance to non-Kodak film processing laboratories. (EX 112-25.)

In mid-1978, Kodak assigned Norman D. McClaskey of its corporate legal department to review Kodak's policy with respect to returning to customers sexually explicit pictures, the content of which is discovered during the routine processing of customer orders in Kodak's film processing laboratories. In particular, Mr. McClaskey was assigned the task of determining whether and when returning such pictures might subject Kodak and/or its employees to a risk of being charged with or criminally prosecuted for violating state or federal obscenity laws. (EX 101: 5-15.)

Mr. McClaskey concluded that Kodak and/or its employees risk criminal prosecution if they knowingly deliver to customers sexually explicit pictures which depict subject matter which may be subject to regulation under constitutionally valid federal and state obscenity statutes. With respect to such pictures and the obscenity statutes of concern, Mr. McClaskey determined that the controlling United States Supreme Court decision is Miller v. California, 413 U.S. 15 (1973). In Miller and subsequent cases, the Court stated that patently offensive representations or descriptions of the following subject matter can be regulated by state and federal obscenity laws without violating the free speech guarantees of the United States Constitution:

- (a) Ultimate sexual acts, normal or perverted, actual or simulated;
 - (b) Masturbation, excretory functions, and lewd exhibition of the genitals.

Miller v. California, supra, 413 U.S. at 25.3

Mr. McClaskey further determined that federal obscenity laws and state obscenity statutes in those states in which Kodak operates film processing laboratories regulate the distribution of the types of pictures that fall within the *Miller* guidelines and had been held constitutionally valid as so applied. (EX 101-02.)

Based upon Mr. McClaskey's analysis and recommendations, Kodak adopted the uniform policy of not returning to customers sexually explicit pictures which are discovered during the routine processing of customer orders to depict subject matter which falls within the *Miller* guidelines. Kodak's policy was formulated unilaterally and was based on the independent business consideration of avoiding the risk of injury and/or expense that would result if Kodak and/

^{&#}x27;The criteria stated in this ruling are referred to herein as "the Miller guidelines".

or its employees were accused or convicted of violating constitutionally valid state and federal obscenity laws. Kodak's policy was *not* formulated (a) at the request of, in cooperation with or with the knowledge of law enforcement authorities or (b) with any intent or purpose on the part of Kodak of participating in the enforcement of the obscenity laws or of censoring or suppressing the publication or distribution of sexually explicit film, pictures or magazines. (EX 103-105.)

Kodak's formulated policy was reduced to a written notice to customers reading as follows:

NOTICE

Because of Federal and State laws relating to pornography, Eastman Kodak does not wish to handle pictures that show sexually explicit conduct. Our Legal Department has informed us that processing pictures for customers depicting the following subject matter may subject Kodak to potential criminal prosecution:

- (a) Ultimate sexual acts, normal or perverted, actual or simulated.
- (b) Masturbation, excretory functions or lewd exhibitions of genitals.

Film sent to Kodak for processing which depicts such subject matter will not be returned because of the potential legal problems mentioned above. (EX 106.)

Kodak directed employees of its film processing laboratories to give copies of this notice to customers in the latter part of 1978 and the first part of 1979. (EX 104: 1-5.) On December 8, 1978, a copy of this notice was given by Kodak's Hollywood, California film processing laboratory to Robert DeMarco, who represented himself as the Photo Director of Hustler Magazine. Mr. DeMarco read the notice at that time and told Kodak's representative that he would

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inform Larry Flynt as to Kodak's policy. (EX 109: 13-25.) Mr. DeMarco does not deny receiving such notice.4

Plaintiffs allege in their complaint that from February 13, 1979 through February 13, 1980, Kodak refused to return to plaintiffs a number of pictures developed from film transmitted to Kodak's processing laboratories by plaintiffs for development. (EX 3: 19-22.) Kodak submitted uncontroverted evidence that no pictures were withheld by its film processing laboratories during the relevant time period from orders submitted under the name of either plaintiff. (EX 147-65.) However, for purposes of this appeal, as in the district court. Kodak accepts plaintiffs' assertion that sexually explicit pictures withheld by Kodak's film processing laboratories during the relevant time period, although submitted under the names of individual photographers, belonged to plaintiffs. (EX 366: 9-10.) Plaintiffs' posited ownership of certain sexually explicit pictures withheld by Kodak during the relevant time period furthers Kodak's contention that it has a contractual right, pursuant to its policy notice effectively communicated to plaintiffs, not to return such pictures.

Two factual matters deserve special emphasis. First, plaintiffs seek to make it appear that Kodak withholds sexually explicit pictures from plaintiffs for the purpose of preventing plaintiffs from using these materials in their magazines; plaintiffs characterize this alleged interference with the production of their magazines as a "prior restraint" forbidden by the First Amendment. The record not only

^{*}The subject matter of film submitted to Kodak for processing can be ascertained only after that film has been developed. Accordingly, to implement its policy Kodak must rely on advance notice such as that given to Mr. DeMarco and, in the event such notice goes unheeded, on its refusal to return certain sexually explicit pictures to customers when Kodak discovers such pictures.

does not support these assertions — it belies them. Kodak withholds Miller-type films and pictures from all customers, not just publishers. Kodak does so not to prevent the customers from using the pictures either to gratify themselves or to display to others, but to protect Kodak and its employees from criminal charges and prosecution based on the very act of mailing or otherwise delivering the film and pictures to Kodak's customers. Kodak seeks not to play the censor but to avoid violation of the law.

Second, the fact that this is true makes irrelevant another of plaintiffs' principal contentions: that Kodak's actions are unjustified because Kodak has no way of knowing whether plaintiffs will publish any particular picture, or will alter it before doing so, or will publish the picture in the context of a magazine containing other material of redeeming social value. This argument misses the point: if Kodak and/or its employees are prosecuted for returning sexually explicit pictures to plaintiffs in violation of an obscenity law, all that will be before the trier of fact will be the pictures themselves, unedited and without ameliorating context. It would be no defense in such a criminal action to show that after the pictures were returned by Kodak to these plaintiffs, they did not use the pictures, or that before publication they

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^{&#}x27;18 U.S.C. §§1461, 1462 and 1465 prohibit knowingly mailing or transporting in interstate commerce any "obscene, lewd, lascivious, or filthy" material and impose criminal sanctions upon violators.

California Penal Code §311.2(a) provides, in relevant part, as follows:

Every person who knowingly sends or causes to be sent, . . ., or
in this state possesses, prepares, publishes or prints, with intent
to distribute or to exhibit to others, or who offers to distribute,
distributes or exhibits to others, any obscene matter is guilty of
a misdemeanor.

These statutes which Kodak seeks to avoid violating have been held to pass constitutional muster under the Miller guidelines. Hamling v. United States, 418 U.S. 87 (1974) (re 18 U.S.C. §1461); Bloom v. Municipal Court, 16 Cal.3d 71, 127 Cal.Rptr. 317, 545 P.2d 229 (1976) (re California Penal Code §§311 and 311.2).

modified those parts of the pictures that violate the *Miller* guidelines, or that the issues of Hustler and Chic Magazines in which the pictures appeared contained sufficient material of redeeming social value to cause the magazines, taken as a whole, to be protected by the First Amendment.

ARGUMENT.

I. STANDARD OF REVIEW ON APPEAL.

In reviewing the grant or denial of a summary judgment motion, the appellate court applies the same principles that are initially employed by the district court under Federal Rule of Civil Procedure 56(c). Accordingly, the reviewing court must answer the following two questions: (1) is there any genuine issue of material fact and (2) if not, then viewing the evidence and the inferences which may be drawn therefrom in the light most favorable to the adverse party, is the moving party entitled to prevail as a matter of law? rederal Deposit Insurance Corp. v. First National Finance Co., 587 F.2d 1009, 1010-11 (9th Cir. 1978); Radobenko v. Automated Equipment Corp., 520 F.2d 540, 543 (9th Cir. 1975). Thus, the standard of review applicable to this appeal is de novo review. Bank of California, N.A. v. Opie, 663 F.2d 977, 979 (9th Cir. 1981).

Plaintiffs' statement that it is Kodak's burden to show absence of state action (AOB 21 fn. 16) is simply untrue. To establish a claim for relief against a private party under 42 U.S.C. §1983 and/or the First or Fourteenth Amendments, a plaintiff must show that that defendant's actions constitute state or governmental action. Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 155 (1978); Adickes v. S.H. Kress and Co., 398 U.S. 144, 150 (1970); United States v. Price, 383 U.S. 787, 794 fn. 7 (1966). Moreover, the determination of whether the requisite state or governmental action exists is a legal conclusion to be drawn from the undisputed facts. Such a conclusion of law is freely reviewable on appeal. Societe de Conditionnement en Aluminum v. Hunter Engineering Co., Inc., 655 F.2d 938, 941 (9th Cir. 1981); Miller v. United States, 587 F.2d 991, 994

(9th Cir. 1978). Therefore, as with any question of law not involving a factual determination, it is illogical to speak of burdens of proof.

II. PLAINTIFFS HAVE ABANDONED THEIR ANTITRUST CLAIMS.

The first claim for relief alleged in the complaint in this action seeks damages and injunctive relief for alleged violations of the Sherman Antitrust Act (15 U.S.C. §§1, 2). (EX 1-5.) The district court held that there was no unreasonable restraint of trade by reason of Kodak's actions and that, in fact, the application of Kodak's policy promotes competition in the photofinishing market because plaintiffs and others similarly situated must take their film to plaintiffs' competitors for development. (EX 378-79.) The district court also held that the Sherman Act does not compel Kodak to deal with all who seek its services, citing United States v. Colgate & Co., 250 U.S. 300, 307 (1919), as holding that a private corporation "is free to exercise an independent discretion as to the parties with whom he will deal, announcing in advance the circumstances under which he will refuse to sell." (EX 379: 11-15.)

Based on these rulings, the district court dismissed plaintiffs' first claim for relief with leave to amend within ten days. (EX 408: 3-9.) Plaintiffs failed to amend their complaint within the time allowed and final judgment was entered in favor of Kodak on that claim. (EX 412-14.)

Rather than pursuing their antitrust claims in their opening brief, plaintiffs have chosen to ignore the antitrust issues. Therefore, plaintiffs must be held to have abandoned their antitrust claims for purposes of this appeal. Ellingson v. Burlington Northern, Inc., 653 F.2d 1327, 1331-32 (9th Cir. 1981); Levy v. Urbach, 651 F.2d 1278, 1280-81 fn. 3 (9th Cir. 1981); Pan-Islamic Trade Corp. v. Exxon Corp.,

Moreover, the district court's ruling was correct. The Colgate doctrine has been simply stated as follows: A unilateral refusal to deal, without more, it is not unlawful under the Sherman Act in the absence of a purpose to create or maintain a monopoly. This doctrine has been expressly adopted by this Court. Marquis v. Chrysler Corp., 577 F.2d 624, 640 (9th Cir. 1977); Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1220 (9th Cir. 1971). Only a refusal to deal which is anticompetitive in purpose or effect, or both, constitutes an unreasonable restraint of trade in violation of the Sherman Act. Fount-Whip, Inc. v. Reddi-Whip, Inc., 568 F.2d 1296, 1300 (9th Cir. 1978); Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), cert. denied, 396 U.S. 1062 (1970) (liquor distiller's termination of wholesale liquor distributor for legitimate business purposes and not for some anticompetitive or monopolistic objective is not actionable under the Sherman Act); Official Airline Guides, Inc. v. Federal Trade Commission, 630 F.2d 920 (2d Cir. 1980), cert. denied, 450 U.S. 917 (1981) (monopolist publisher of airline flight schedules not seeking to preserve its own monopoly and not acting to benefit itself competitively did not have a duty not to discriminate between certified air carriers and commuter airlines in a fashion which placed the latter at a significant competitive disadvantage).

111.

PLAINTIFFS ARE BOUND BY THE TERMS AND LIMITATIONS STATED IN KODAK'S NOTICE TO CUSTOMERS.

The provisions of Kodak's customer notice, which was given to plaintiffs' representative DeMarco, state in part the terms upon which Kodak is willing to accept film for pro-

cessing and return to customers. Such terms constitute a part of the contract which defines the legal relationship between Kodak and its customers and the rights and duties of Kodak. Pursuant to such contract, Kodak has the right not to return to customers, including plaintiffs, pictures which depict the kind of sexually explicit conduct described in Kodak's customer notice. Plaintiffs, by submitting film to Kodak with knowledge of the terms and limitations of Kodak's offer to process and return pictures to customers, accepted and became bound by those terms and limitations.⁶

When an offer to render a service on conditions is made, an acceptance of the service constitutes an acceptance of the conditions or limitations of the offer as well. Massachusetts Mutual Life Insurance Co. v. George & Co., 148 F.2d 42, 46 (8th Cir. 1945). Similarly, the receipt and acceptance by one party to a contract of a writing from the other party purporting to state the terms and conditions of the contract binds both parties. Bernard v. Walkup, 272 Cal.App.2d 595, 602, 77 Cal.Rptr. 544 (1969).

Plaintiffs contend that they did not agree to the terms of Kodak's notice or waive any right or craim agains. Kodak for the return of their pictures. (EX 299: 6-10.) However, plaintiffs expressed no reservations or objections to Kodak's policy when their pictures were submitted to Kodak for processing. Accordingly, they are bound by the terms of Kodak's notice. It is axiomatic that the existence of mutual assent to a contract is determined by objective rather than subjective criteria, considering the outward manifestations

The district court did not rely upon this contract ground for its decision. However, faced with an almost identical lawsuit brought by another magazine publisher, the New Jersey state courts recently granted judgment in favor of Kodak on this basis. *Penthouse International*, *Ltd. v. Eastman Kodak Co.*, 179 N.J.Super, 155 (Ch.Div. 1980), *affd. per curiam*, No. A-3110-80-T2 (App.Div. April 2, 1982).

of the acts said to constitute the acceptance. Meyer v. Benko, 55 Cal. App.3d 937, 942-43, 127 Cal. Rptr. 846 (1976). Plaintiffs' unconditional submission of film to Kodak for processing constituted plaintiffs' acceptance of the conditions and limitations of Kodak's offer and the formation of a contract on those terms.

IV.

THE DISTRICT COURT CORRECTLY HELD THAT PLAIN-TIFFS HAVE NO CLAIMS FOR RELIEF AGAINST DEFEN-DANT UNDER 42 U.S.C. §1983 OR THE FIRST OR FOUR-TEENTH AMENDMENTS BECAUSE PLAINTIFFS HAVE FAILED TO ESTABLISH THAT KODAK'S ACTIVITIES CON-STITUTE STATE OR GOVERNMENTAL ACTION.

The district court concluded that plaintiffs' second claim for relief, based on Kodak's alleged violation of 42 U.S.C. §1983, lacks the "under color of state law" element required to establish a right to recover under that statute and granted defendant's motion for summary judgment thereon. The district court ruled similarly on plaintiffs' third claim for relief, holding that Kodak's policies and practices lack the state or governmental involvement necessary to establish a violation of plaintiffs' rights protected by the First and Fourteenth Amendments to the United States Constitution and thus cognizable by the district court. (EX 389-91.) In reaching these conclusions, the district court rejected plaintiffs' contention that the requisite state or governmental involvement in Kodak's challenged policy is satisfied by (1) the fact that state and federal trademarks and federal patents have allegedly been granted to Kodak (EX 389: 17-20) and (2) the fact that Kodak's sexually explicit picture policy was adopted in order to avoid the risk of presecution under constitutionally valid state and federal obscenity laws. (EX 389-91.)

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Plaintiffs challenge these conclusions, chiefly by criticizing the authorities relied upon by the district court and taking these authorities out of context. These attacks are without merit. They are also inconsequential for, as we will show, both of the district court's conclusions were correct, and therefore the resulting judgment must be affirmed.

A. The Requirements for Showing State or Governmental Action Within the Meaning of 42 U.S.C. §1983 and the First and Fourteenth Amendments.

Plaintiffs' second, third and fourth claims for relief are alleged in the complaint to "arise under" federal law—the second claim under 42 U.S.C. §1983 and the third and fourth claims under the First and Fourteenth Amendments to the United States Constitution. However, as the district court correctly concluded, plaintiffs failed to show that these allegations are well founded.

It is established that the "state action" requirement of the Fourteenth Amendment is equivalent to the "under color of state law" requirement of 42 U.S.C. §1983. United States 2. Price, 383 U.S. 787, 794 fn. 7 (1966); Briley v. State of California, 564 F.2d 849, 855 (9th Cir. 1977). It is also established that the prohibitions of the Fourteenth Amendment do not apply to conduct which falls wholly within the

Plaintiffs' focusing of their argument upon the district court's opinion "misconstrues the function of this appellate tribunal. It is [this court's] task to review final judgments, not to pass upon the cogency or lack thereof of any particular rationale upon which the district court may rely." City of Milwaukee v. Saxbe, 546 F.2d 693, 704 (7th Cir. 1976). As this Court has previously observed, if "the ultimate conclusion of the district court... is correct, we need not determine whether the lower court relied upon a wrong ground or gave a wrong reason." Moore v. James H. Matthews & Co., 550 F.2d 1207, 1219 (9th Cir. 1977). The governing rule is that a district court's decision that is legally correct must be affirmed regardless of the reasons given therefor by the lower court. Helvering v. Gowran, 302 U.S. 238, 245 (1937); Hummell v. S.E. Rykoff & Co., 634 F.2d 446, 452 (9th Cir. 1980).

private sector. Burton v. Wilmington Parking Authority, 365 U.S. 715, 721-22 (1961). Similarly, the constitutional guarantees of freedom of speech and press offer protection against state or federal governmental action only; they neither apply to nor restrict private action. Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 114 (1973). Consequently, where action taken is by a private corporation with no overriding or pervasive governmental involvement, the provisions of the First and Fourteenth Amendments impose no limitations upon that action. Ginn v. Mathews, 533 F.2d 477, 479 (9th Cir. 1976); Holodnak v. Avco Corp., Avco-Lycoming Division, 514 F.2d 285, 292 (2d Cir.), cert. deried, 423 U.S. 892 (1975).

It is true the situations do arise where state or federal law, custom or policy and the conduct of private corporations or individuals are so intertwined that the activities of the latter are held to constitute "state action" or "governmental action", bringing their conduct within the reach of statutory or constitutional provisions not applicable to private action. The Supreme Court announced the following test for determining whether or not sufficient governmental involvement to constitute "state action" exists in the actions of a private regulated business:

. . . the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself. *Jackson v. Metropolitan Edison Company*, 419 U.S. 345, 351 (1974) (citations omitted).

This Court likewise has held that where the challenged action is that of a private individual, the central inquiry is whether the government is significantly involved or entangled in the private action. *Melara v. Kennedy*, 541 F.2d 802, 804 (9th Cir. 1976).

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Plaintiffs argue that there is a sufficient connection between Kodak, the United States and California to make Kodak's conduct "state action" or "governmental action" both generally and in the context of this case, based on plaintiffs' allegations:

- (1) "that the unique superiority of Defendant's product is the result of Defendant's ownership of numerous patents granted by the United States and trademarks registered by the United States in various States." (EX 6: 3-6.); and
- (2) that certain federal and state obscenity statutes have "delegated to Kodak the responsibility of censoring the speech of Plaintiffs and all other customers . . . who wish to use Defendant's unique processing ability." (EX 6: 20-24; 8: 8-12.)

The district court correctly rejected these contentions.

B. The District Court Correctly Held That the Grant of Exclusive Patent and Trademark Rights Does Not Make the Conduct of the Grantee State or Governmental Action.

Plaintiffs appear to contend that because Kodak allegedly holds federal patents and federal and state trademarks, *all* of Kodak's conduct constitutes state or governmental action. If plaintiffs were correct, then *every act* of any holder of a patent or trademark would constitute state or governmental action. The district court correctly rejected this bizarre contention in the light of precedents in analogous situations. (EX 389: 17-20.)

It is clear that the grant of a corporate charter does not involve the state to such a degree in the activities of the chartered corporation as to make the latter's business policies and practices "state action". Greenya v. George Washington University, 512 F.2d 556, 560 (D.C. Cir.),

cert. denied, 423 U.S. 995 (1976). Similarly, the grant of a liquor license to a private club does not sufficiently implicate the state in the racially discriminatory policies of that club so as to satisfy the "state action" requirement of the Equal Protection Clause of the Fourteenth Amendment. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 177 (1972). Nor does the fact that private entities conduct business pursuant to state licenses and permits make their activities state action. Fulton v. Hecht, 545 F.2d 540 (5th Cir.), cert. denied, 430 U.S. 984 (1977) (state licensing and regulation of greyhound race track did not make licensee's acts state action within §1983); Gemini Enterprises, Inc. v. WFMY Television Corp., 470 F.Supp. 559 (N.D.N.C. 1979) (action by state-licensed broadcaster denving astrological forecasting service media access did not constitute state action within §1983); Guthrie v. Alabama By-Products Co., 328 F.Supp. 1140 (N.D.Ala. 1971), aff d, 456 F.2d 1294 (5th Cir. 1972), cert. denied, 410 U.S. 946 (1973) (discharge of industrial waste pursuant to state-issued permit did not constitute state action within §1983); cf. Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973) (plurality opinion: action of broadcast licensee in not accepting editorial advertisements did not constitute governmental action under the First Amendment).

Plaintiffs contend that the "unique superiority" of Kodak's product is the result of its ownership of numerous patents and trademarks. (AOB 20.) However, this conclusory allegation, if true, would contribute nothing towards satisfying the governmental action requirement. The Supreme Court has held that the claim that a state allegedly conferred monopoly status upon a defendant is not determinative in considering whether or not that defendant's termination of electrical service to the petitioner was "state action" within the Fourteenth Amendment. Jackson v.

Metropolitan Edison Company, 419 U.S. 345, 351-52 (1974); accord, Taylor v. St. Vincent's Hospital, 523 F.2d 75, 77-78 (9th Cir. 1975), cert. denied, 424 U.S. 948 (1976).

Plaintiffs have cited no case and we have found none deciding the precise question whether a grant of patent or trademark rights is sufficient to make all of the activities of the grantee "state action". The above-cited analogous cases dealing with actions under state charters, permits and licenses require a negative conclusion. Moreover, whereas those cases dealt with a state's authorization of private entities to engage in particular activities affecting third parties, the alleged grant of exclusive patent and trademark rights to Kodak is not necessary to authorize and does not authorize the transaction of business by Kodak. Instead, it merely prevents third parties from interfering with protected property rights of Kodak.8 Therefore, there is really less governmental involvement in Kodak's exercise of its protected property rights than there is in the above-cited cases.

C. The District Court Correctly Concluded That Kodak Does Not '.ct "Under Compulsion of I aw" Within the Meaning of Prior Racial Discrimination Cases.

Plaintiffs argue that Kodak's taking of steps designed to avoid possible prosecution under constitutionally valid federal and state obscenity laws makes Kodak's policy and

[&]quot;Plaintiffs cite Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964) and Griffith Rubber Mills v. Hoffer, 313 F.2d 1 (9th Cir. 1963), for the proposition that patent and trademark rights are issued not for private benefit but for the public good. (AOB 22-23.) However, neither of these cases advance plaintiffs' argument. Both note that the grant of a patent is the grant of a statutory monopoly which gives the patent holder the right to exclude others from the unauthorized use of his invention for a limited period of years. Patent grants benefit the general public in the sense that the patent holder must publicly disclose his invention to get his patent and that, upon expiration of the patent, the invention enters the public domain and may be used freely by anyone.

practice state or governmental action. This contention is specious.

The evidence is uncontroverted that Kodak acted unilaterally in adopting its challenged policy and not in concert or collaboration with, or at the request or instigation of, any federal or state law enforcement official. Nor did Kodak act to further the social policies reflected in the obscenity laws, or as a "volunteer policeman" to see that those laws are enforced against plaintiffs or anyone else. Kodak adopted its policy only to protect its own interest, solely because Kodak fears that returning the sexually explicit pictures it withholds might subject Kodak and/or its employees to the risk of being criminally prosecuted for violating constitutionally valid state and federal obscenity laws. In adopting the challenged policy Kodak's officers acted solely as business executives, not as either adjunct government officials, censors, or moral crusaders. (EX 100-05.)

Nevertheless, plaintiffs contend that the requisite state or governmental action element is satisfied because Kodak allegedly acted "under compulsion" of federal and state obscenity statutes. (AOB 10-20.) Plaintiffs base their argument on three Supreme Court decisions applying a less restrictive jurisdictional requirement respecting state or governmental action in cases involving charges of racial discrimination. See Adickes v. S.H. Kress and Company, 398 U.S. 144 (1970); Robinson v. State of Florida, 378 U.S. 153 (1964); and Peterson v. City of Greenville, South Carolina, 373 U.S. 245 (1963); (AOB 10-13).

The district court found that Kodak is not involved in any racial discrimination and that the less exacting state action requirement applied by the Supreme Court in certain racial discrimination cases therefore does not apply here. (EX 390-91.) The district court also held that the less exacting governmental action requirement of the racial discrimination

cases does not apply to the plaintiffs' claimed deprivation of their First Amendment Rights. (EX 390: 10-17.) These conclusions are correct and mandate affirmance of the district court's judgment in this action.

The record clearly shows that Kodak did not adopt and is not implementing its challenged policy by reason of any federal or state statutory or other governmental directive that Kodak do so. Rather, Kodak has unilaterally chosen to act as it does in order to avoid the risk of prosecution under federal and state obscenity laws. As stated by this Court in Adams v. Southern California First National Bank, 492 F.2d 324, 331 (9th Cir. 1973), "... subjecting all behavior that conforms to state law to the Fourteenth Amendment would emasculate the state action concept."

Furthermore, many decisions have held that the less exacting state or governmental action requirement applied by the Supreme Court in the decisions cited by plaintiffs does not apply outside the context of racial discrimination. Schlein v. Milford Hospital, Inc., 561 F.2d 427, 428 fn. 5 (2d Cir. 1977); Granfield v. Catholic University of America, 530 F.2d 1035, 1046 fn. 29 (D.C. Cir.), cert. denied, 429 U.S. 821 (1976); Fletcher v. Rhode Island Hospital Trust and National Bank, 496 F.2d 927, 931 (1st Cir.), cert. denied, 419 U.S. 1001 (1974); Jackson v. Statler Foundation, 496 F.2d 623, 628-29 (2d Cir. 1974), cert. denied, 420 U.S. 927 (1975); Adams v. Southern California First National Bank, supra, 492 F.2d 324, 333 (9th Cir. 1973), cert. denied, 419 U.S. 1006 (1974); see also Scott v. Eversole Mortuary, 522 F.2d 1110, 1119 (9th Cir. 1975) (Judge Ely concurring in part, dissenting in part). The stated rationale for the Supreme Court's willingness to more readily find state or governmental action in the area of racial discrimination is that government inaction or neutrality in the face of such discrimination has often been found to

constitute affirmative encouragement. Schlein v. Milford Hospital, Inc., supra, 561 F.2d 427, 428 fn. 5 (2d Cir. 1977).9

The Supreme Court cases relied upon by plaintiffs are also distinguishable from the case at bench for another reason: all of them involved refusal of service to customers by places of public accommodation — lunch counters and the like — i.e., establishments having a historical common law duty to serve all in the community. As the district court found, applying Colgate, Kodak is under no such duty but is free to deal with whom it chooses. A criminal statute which induces or encourages a place of public accommodation to practice racial discrimination is one thing for purposes of applying the state or governmental action doctaine; a criminal statute which causes a private corporation to eschew trafficking in Miller-type obscenity simply to avoid violating the law is another.

Furthermore, in each of the Supreme Court decisions relied upon by plaintiffs, the private party's segregation

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⁹Justice Brennan, concurring in part and dissenting in part in Adickes v. S.H. Kress and Company, 398 U.S. 144 (1970), stated as follows:

The state-action doctrine reflects the profound judgment that denials of equal treatment, and particularly denials on account of race or color, are singularly grave when government has or shares responsibility for them. Government is the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct. Therefore something is uniquely amiss in a society where the government, the authoritative oracle of community values, involves itself in racial discrimination. Accordingly, in the cases that have come before us this Court has condemned significant state involvement in racial discrimination, however subtle and indirect it may have been in whatever form it may have taken. These decisions represent vigilant fidelity to the constitutional principle that no State shall in any significant way lend its authority to the sordid business of racial discrimination. Id., 398 U.S. at 190-91 (emphasis added; citations omitted).

policy was enforced by use of the state's criminal trespass or vagrancy laws. The private party discriminator was put on notice that should he choose to discriminate he could call upon the state police power to effectuate his private decision through the imposition of criminal sanctions. Thus, the purposes of the respective state schemes were clearly to foster and encourage racial discrimination and to afford private discriminators a remedy under state criminal law to enforce their decision to discriminate. No such circumstances are present in the instant action regarding Kodak's uniform policy not to return certain sexually explicit pictures to any customers.

Only one decision has applied the "compulsion doctrine" of the racial discrimination cases outside of that context. That case is *Doe v. Charleston Area Medical Center, Inc.*, 529 F.2d 638 (4th Cir. 1975), holding that a private hospital acted under color of state law when it refused to allow its facilities to be used by the plaintiff for an abortion, because the hospital feared criminal prosecution if abortions were permitted. The district court correctly concluded that the *Doe* decision of the Fourth Circuit stands alone. (EX 401: 1-5.)

Defendant submits that *Doe* is simply wrong and should not be followed in this case. A decision by the Court of Appeals of another Circuit is not binding on this Court. Allstate Insurance Co. v. Stevens, 445 F.2d 845, 846 (9th Cir. 1971); 1B Moore's Federal Practice, ¶0.402[1], p. 63 (1982). Furthermore, one ground for the decision in *Doe* was that the state action element is satisfied in the case of a private hospital by the receipt of federal funds under the Hill-Burton Act (42 U.S.C. §§291 et seq.). This view has been rejected by nearly every Circuit, including the Fourth Circuit. Modaber v. Culpeper Memorial Hospital, Inc., No. 81-1550 (4th Cir. Mar. 24, 1982); Ward v. St. Anthony

Hospital, 476 F.2d 671, 674-75 (10th Cir. 1973); Taylor v. St. Vincent's Hospital, 523 F.2d 75, 77 (9th Cir. 1975), cert. denied, 424 U.S. 948 (1976); Briscoe v. Bock, 540 F.2d 392, 395-96 (8th Cir. 1976); Musso v. Suriano, 586 F.2d 59, 62-63 (7th Cir. 1978), cert. denied, 440 U.S. 971 (1979); Jackson v. Norton-Children's Hospitals, Inc., 487 F.2d 502, 503 (6th Cir. 1973), cert. denied, 416 U.S. 1000 (1974); Madry v. Sorel, 558 F.2d 303, 304-05 (5th Cir. 1977), cert. denied, 434 U.S. 1086 (1978); Hodge v. Paoli Memorial Hospital, 576 F.2d 563, 564 (3d Cir. 1978); Schlein v. Milford Hospital, Inc., 561 F.2d 427, 428 (2d Cir. 1977). Moreover, the alternative basis for the decision in Doe, that the hospital's anti-abortion policy based on West Virginia's criminal abortion statute constituted state action, has never been cited with approval by any subsequent decision. As in the Supreme Court racial discrimination cases, the West Virginia criminal abortion statute upon which the hospital's policy was based in Doe was held unconstitutional on its face. Therefore, the Doe decision must be viewed as an aberration, standing alone, which is neither binding on this Court nor applicable to the instant facts.

D. Kodak's Policy Does Not Constitute Censorship of Flaintiff's Activities or Publications.

Plaintiffs argue that the federal government and California have by their obscenity statutes "delegated" to Kodak the "traditional power and public function of a censor" and that Kodak's conduct pursuant to such delegation constitutes the requisite state or governmental action. (AOB 23-27.) This argument finds no support whatever in the record. In giving effect to its policy and practice of refusing to return certain sexually explicit pictures. Kodak sits as neither court, trier of fact, nor censor and Kodak neither exercises

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nor purports to exercise governmental powers. Kodak has no interest in suppressing what plaintiffs publish; the independent business judgment reflected in Kodak's policy is simply one of trying to avoid the risk of prosecution under the obscenity laws. Moreover, plaintiffs are not in fact "censored", i.e., precluded from publishing their magazines, as shown by their admission, if not boast, that they are currently publishing what is, by their self-asserted most demanding critical and artistic standards, a "present superior product." (EX 274: 4.)

Plaintiffs rely on Marsh v. State of Alabama, 326 U.S. 501 (1946), wherein the Supreme Court held that the Fourteenth Amendment applied to nominally private activities abridging free speech where the government had delegated to a private group the power to perform traditionally public functions. In Marsh, the Court held that the state could not impose criminal punishment on a member of the Jehovah's Witnesses who undertook to distribute religious literature on the premises of a company-owned town contrary to the wishes of the town's management. Of course the situation of the company town in Marsh is totally different and distinguishable from that of Kodak in the instant case. Unlike the company town in Marsh, Kodak does not possess the indicia of a government sanctioned censor nor does its challenged practice result in the actual censorship of plaintiffs' magazines. Kodak's challenged practice, unlike the enforcement of the town ordinance in Marsh, does not bar plaintiffs from publishing and distributing their magazines when and where they choose and with whatever content they choose. At most, Kodak's policy precludes Kodak's knowing participation in anyone's possibly pornographic activities.

Furthermore, in *Melara v. Kennedy*, 541 F.2d 802, 805 (9th Cir. 1976), this Court, while noting decisions of other courts holding that state action may be found where there

has been a delegation of traditional state functions to private parties through the enactment of state statutes, noted that the "delegation of state function" rationale had never been accepted by the Ninth Circuit. In Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 163 (1978), the Supreme Court cited Marsh and its progeny re the potential expansion of the public function doctrine and concluded as follows:

Thus, even if we were inclined to extend the sovereign function doctrine outside of its presently carefully confined bounds, the field of private commercial transactions would be a particularly inappropriate area into which to expand it. (Emphasis added.)

Therefore, even assuming for purposes of argument the specious premise that Kodak's actions constitute performance of a traditional public function of sovereignty, this would not satisfy the requisite "governmental action" element because Kodak's actions are confined to the field of private commercial transactions.

To hold that Kodak's policy constitutes "state action" or "governmental action" would place Kodak in a "Catch-22" dilemma: If Kodak disobeys the constitutionally valid federal and state obscenity statutes by returning certain sexually explicit pictures to customers, Kodak risks having to defend itself and its employees against federal and/or state criminal prosecutions; if Kodak attempts to avoid violating these statutes, it then risks the filing of this action and others of like character. In either event, Kodak must incur heavy legal expense, disruption of normal business activity, and the risk of a costly and/or punitive outcome through criminal

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¹⁰A film processing laboratory employee was so convicted in *Gold v. United States*, 378 F.2d 588 (9th Cir. 1967); cf. Spillman v. United States, 413 F.2d 527 (9th Cir.), cert. denied, 396 U.S. 930 (1969) (conviction under 18 U.S.C. §1461 for mailing undeveloped movie film for processing).

prosecutions and/or civil actions brought against the Company and/or its employees. The district court recognized that to place Kodak in such a situation — i.e., "in the middle" between plaintiffs and law enforcement authorities, the true antagonists in the pornography field — would be nothing short of monstrous.

V.

PLAINTIFFS' CLAIM FOR DECLARATORY RELIEF LACKS THE CONCRETE ADVERSENESS NECESSARY TO CREATE A JUSTICIABLE CONTROVERSY.

Plaintiffs' fourth claim for relief seeks a declaratory judgment against Kodak that certain federal and state obscenity statutes are unconstitutional to the extent that they may be interpreted as prohibiting a film processing company from returning sexually explicit pictures in those instances where development of the pictures "is merely an interim step in the publishing process of a magazine." (EX 10: 1-6.) Plaintiffs seek a declaration that the federal and state obscenity statutes are unconstitutional both facially and as applied to Kodak because, it is said, they operate as a prior restraint creating an impermissible chilling effect upon plaintiffs' speech. (EX 10: 1-11.)

Kodak has no interest in defending against this claim or upholding the challenged enactments. Based on this fact, the district court correctly held that it did not have federal subject matter jurisdiction to determine the constitutionality

¹¹Plaintiffs claim that, because they are magazine publishers, the First Amendment gives them a right of special access to Kodak's facilities to develop their sexually explicit pictures, beyond the constitutional right accorded to members of the general public. This is simply untrue. The Constitution does not require that the press be given special access to information sources not shared by members of the public generally. *Pell v. Procunier*, 417 U.S. 817, 834 (1974) (upholding the constitutionality of a California prison regulation barning members of the news media from conducting face-to-face interviews with preselected inmates).

of the challenged state and federal obscenity statutes because this case lacks the concrete adverseness necessary to create a justiciable controversy within the meaning of article III, section 2, clause 1 of the United States Constitution and the Federal Declaratory Judgment Act (28 U.S.C. §2201). (EX 392-94.)

Article III, section 2, clause 1 of the United States Constitution and the Federal Declaratory Judgment Act (28 U.S.C. §2201) extend the federal judicial power only to cases of "actual controversy" wherein declaratory relief is sought. A federal court has no power to issue a declaratory judgment regarding the constitutionality of a statute unless there is an actual and substantial controversy as to the constitutionality of the statute between parties having truly adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. Golden v. Zwickler, 394 U.S. 103, 108 (1969). In this case, Kodak has no such legal interest or motive to defend the constitutionality of the federal and state obscenity statutes attacked by plaintiffs.

The standard for finding a justiciable controversy is no less demanding in a declaratory judgment action than in any other type of federal court action. Societe de Conditionnement v. Hunter Engineering, 655 F.2d 938, 942 (9th Cir. 1981); Western Mining Council v. Watt, 643 F.2d 618, 623-24 (9th Cir.), cert. denied, ____ U.S. ____, 102 S.Ct. 567 (1981).

In the instant case, no representatives of the California and federal governments are before the district court to assert the constitutional validity of the challenged California and federal obscenity statutes. Kodak does not have a personal stake in the outcome of plaintiffs' declaratory relief claim nor any intention of placing itself in the role of the federal government or the State of California to resist it. Under

these circumstances the situation before the district court did not "assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for elimination of difficult constitutional questions." Baker v. Carr, 369 U.S. 186, 204 (1962); see also League of Women Voters of California v. Federal Communications Commission, 489 F.Supp. 517, 520 (C.D.Cal. 1980) (no sufficient genuine adversity where defendant FCC did not attempt to posit any arguments in support of the challenged statute forbidding non-commercial broadcast licensees to editorialize or oppose political candidates).

Plaintiffs point to the existence of 28 U.S.C. §2403, permitting state or federal intervention relating to the constitutionality of challenged statutes affecting the public interest, as protection against this becoming a "collusive" action. (AOB 28-29.) However, as the district court correctly concluded (EX 393-94), the existence of §2403 cannot by itself generate an actual case or controversy where none existed between the private litigants. *United States v. Johnson*, 319 U.S. 302 (1943); *Ruotolo v. Ruotolo*, 572 F.2d 336 (1st Cir. 1978).

VI.

THE DISTRICT COURT CORRECTLY HELD THAT PLAIN-TIFFS FAILED TO COMPLY WITH FEDERAL RULE OF CIVIL PROCEDURE 56(f) AND CANNOT NOW COMPLAIN THAT THE SUMMARY JUDGMENT MOTION WAS PREMATURE.

Plaintiffs contend that the district court should not have ruled on Kodak's motion for summary judgment until the plaintiffs had been afforded an adequate opportunity to conduct discovery. (AOB 45.) The district court rejected this contention because plaintiffs failed to file affidavits requesting a continuance of the summary judgment motion pursuant to Federal Rule of Civil Procedure 56(f). (EX 378: 4-7; 385-88.) It is well established that the plaintiffs' failure

to take advantage of the Rule 56(f) procedural remedy prevents them from now complaining regarding the timing of summary judgment in this case. THI-Hawaii, Inc. v. First Commerce Financial Corporation, 627 F.2d 991, 994 (9th Cir. 1980); British Airways Board v. The Boeing Company, 585 F.2d 946, 954 (9th Cir. 1978), cert. denied, 440 U.S. 981 (1979). Therefore, plaintiffs cannot now contend that the district court acted prematurely in granting Kodak's motion for summary judgment.

CONCLUSION.

For the reasons and based on the authorities discussed above, the judgment of the district court should be affirmed.

Respectfully submitted,

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82-1753

Office-Supreme Court, U.S. F. I. L. E. D.

No.

MAR 19 1983

ALEXANDER L. STE /AS,

SUPREME COURT OF THE UNITED STATES

October Term, 1982

HUSTLER MAGAZINE, INC., a corporation, and CHIC MAGAZINE, INC., a corporation,

Petitioners,

VS.

EASTMAN KODAK COMPANY, a corporation,

Respondent.

WRIT OF CERTIORARI
To The United States Court Of Appeals
For The Ninth Circuit

APPENDIX B (Excerpts Filed With Court Of Appeals) TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HUSTLER MAGAZINE INC., a corporation,)
and CHIC MAGAZINE, INC., a)
corporation,)

Plaintiffs-Appellants,)
vs.)
EASTMAN KODAK COMPANY, a corporation,)

Defendant-Appellee.

EXCERPTS TO APPELLANTS' BRIEF

Appeal from a Judgment For Defendant (Dismissing Count One and Granting Summary Judgment on Counts Two, Three, and Four of Plaintiff's Complaint)

United States District Court for the Central District of California
Honorable Irving Hill, Judge

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1 ALAN ISAACMAN RICHARD D. AGAY FILED 2 COOPER, EPSTEIN & HUREWITZ A Professional Corporation 3 9465 Wilshire Boulevard, Suite 800 FEB 1 3 1990 Beyerly Hills, California 90212 4 CLERK, U. S. DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA (213) 278-1111 5 Attorneys for Plaintiffs 6 RECEIVED 7 FEB 15 1980 8 COOPER, EPSTEIN & HUREWITZ UNITED STATES DISTRICT COURT 9 CENTRAL DISTRICT OF CALIFORNIA 10 11 HUSTLER MAGAZINE, INC., a CIVIL ACTION NO. corporation, and CHIC 12 MAGAZINE, INC., a corporation, COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE 13 Plaintiffs. RELIEF 14 VS. on the basis of: 15 EASTMAN KODAK COMPANY, a Anti-Trust Laws 1. 2. Civil Rights Laws corporation, 16 3. Unconstitutionality Defendant. 17 18 Plaintiffs allege as follows: 19 FIRST CAUSE OF ACTION 20 1. Plaintiffs, HUSTLER MAGAZINE, INC., and CRIC MAGAZINE, INC., are and at all times herein mentioned 21 were corporations organized and existing under and by virtue of 23 the laws of the State of Ohio. 24 Plaintiffs are informed and believe, and thereon 25 allege, that Defendant EASTMAN KODAK COMPANY 20 (hereinafter called "Kodak") is and at all times herein mentioned was a corporation. Kodak transacts business in, and

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is therefore found within, the Central District of California.

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3. This Cause of Action seeks injunctive relief and damages under the Anti-Trust Laws of the United States, and more particuarly, Section 1 of the Sherman Anti-Trust Act, 15 U.S.C. § 1 (1976). Jurisdiction exists under Sections 15 and 26 of Title 15 of the United States Code, and under Section 1337 of Title 28 of the United States Code.

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- 4. Plaintiffs are informed and believe and thereon allege that within one year last past and continuing up to and including the date of filing of this Complaint, Defendant has monopolized and attempted to monopolize interstate trade and commerce in film developing, in violation of Section 2 of the Sherman Anti-Trust Act. 15 U.S.C. § 2 (1976). Such violations are continuing and will continue unless relief hereinafter prayed for is granted.
- 5. Pursuant to and in furtherance of the aforesaid monopolization and attempt to monopolize, Defendant has pursued service, distribution and marketing policies that have prevented competing photofinishers from having an adequate opportunity to effectively compete for business in the market for superior quality developing of film. Defendant has achieved, and attempted to achieve, its monopolization of the photofinishing business by the advantageous use of its significant power in other areas of the film industry. Kodak has thereby limited the ability of other photofinishers to compete with Defendant's photofinishing process in terms of quality and market share, and has attained a position of dominance in the field of commercial color picture photofinishing and developing.

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26 27 28 6. As a result of the aforementioned violations,

Defendant has achieved and maintained a monopoly in the market for superior quality photofinishing. The result of this monopoly is that those who require superior quality in the developing of film must use the services of Defendant.

- 7. At all times relevant herein, Plaintiffs have been engaged in the business of publishing magazines.

 Plaintiffs' business activities are within and directly affect trade and commerce among the several States. In the course of such business, there is a constant and continuous stream of trade and commerce between the several States of the United States, consisting of publication and distribution of their respective magazines within and throughout the several States.
- 8. Until the events alleged below, Plaintiffs relied solely upon the developing process of Defendant for the photographs used in Plaintiffs' magazines. Plaintiffs used Defendant's developing services because of the significantly superior quality of its photofinishing.
- 9. Within one year last past, Kodak refused to return to Plaintiffs various color transparencies which had been developed from film transmitted to Defendant by Plaintiffs. Defendant has informed Plaintiffs that these transparencies will not be returned to Plaintiffs.
- 10. Kodak has also informed Plaintiffs that it will refuse to return to Plaintiffs any film belonging to Plaintiffs if such film contains certain subject matter disapproved by Defendant.
 - 11. As a result of Defendant's actions, Plaintiffs have

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been injured in their businesses and property in excess of \$10,000.00. The precise extent of these injuries has not been ascertained at this time, and Plaintiffs will ask leave of the Court to amend this Complaint to set forth the exact amount thereof when the same has been ascertained. Plaintiffs are entitled under Title 15 United States Code, Section 15, to treble the amount of damages, as they shall be ascertained.

12. Over and above the damages set forth in

Paragraph 11 of this Complaint by reason of injuries heretofore suffered, unless Defendant is enjoined from further refusal to return Plaintiffs' films or from further attempts to create or maintain its monopoly, Plaintiffs will suffer irreparable injury for which there is no adequate remedy at law in the following respects:

- A. It would be extremely difficult, if not impossible, to measure the damages suffered by Plaintiffs as a result of Defendant's refusal to return certain films.
- B. The quality of Plaintiffs' magazines will be substantially lowered. There is no way in which the injury resulting from this decrease in quality can be measured.
 - C. Plaintiffs' ability to exercise their rights of free speech and press will be irreparably harmed.
- Plaintiffs are informed and believe and thereon 13. allege that Defendant, unless restrained, will continue with its monopoly and attempted monopoly, thus

26 27 28 precluding Plaintiffs' ability to go elsewhere to receive comparable services in lieu of Defendant's photofinishing skills. Plaintiffs are therefore entitled under Title 15 United States Code, Section 26, to injunctive relief against further damages to their business as a result of Defendant's continued refusal to return certain of Plaintiffs' film. Without such injunctive relief, Plaintiffs will suffer the irreparable harms discussed in Paragraph 12 above.

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14. Under Section 15 of Title 15 of the United States

Code, Plaintiffs are further entitled to be paid
attorney fees, costs and expenses incurred in the prosecution
of this case. Plaintiffs are unable at this time to set forth
the precise amount of such expenses, costs and attorney fees,
but will present the figure and proof at the close of trial
hereof.

SECOND CAUSE OF ACTION

- 15. Plaintiffs reallege and incorporate herein by reference each and every allegation contained in Paragraphs 1, 2 and 5 through 12 of this Complaint.
- 16. This action arises under the United States

 Constitution, particularly under the provisions of
 the First and Fourteenth Amendments to the Constitution of the
 United States, and under Section 1983 of Title 42 of the United
 State Code.
- 17. This Court has jurisdiction of this cause under and by virtue of Section 1343 of Title 28 of the United States Code.
 - 18. As was more fully alleged in Paragraphs 5 and ϵ

of this Complaint, Defendant holds a clearly dominant position in the film developing industry. Plaintiffs are informed and believe, and thereon allege, that the unique superiority of Defendant's product is the result of Defendant's ownership of numerous patents granted by the United States and trademarks registered by the United States and various States. The unavailability of developing services comparable to Defendant's processing is therefore a result of its connection to Federal and State Governments through the exclusive rights granted to Defendant by those Governments.

- 19. As was more fully alleged in Paragraphs 9 and 10 of this Complaint, Defendant has not returned and refuses to return varous color transparencies belonging to Plaintiffs.
- 20. Defendant asserts that its basis for refusal to return Plaintiffs' film is that it would thereby risk criminal prosecution under obscenity laws, in particular, Section 311.2(a) of the California Penal Code.
- 21. Plaintiffs are informed and believe and thereon allege that the California legislature, in enacting Section 311.2 of the California Penal Code, has delegated to Kodak the responsibility of censoring the speech of Plaintiffs and all other customers of Kodak who wish to use Defendant's unique processing ability. Thereby, the State of California has delegated to Kodak the judicial function of determining when photographs belonging to Plaintiffs and other of Kodak's customers are obscene, so as to justify the interference by the State of California in the free and unfettered expression

- 22. Plaintiffs have been subjected, by the above-recited acts, to the deprivation by Defendant, under color of law and of the custom and usages of the State of California, of their right to freedom of speech and press, as guaranteed under the First and Fourteenth Amendments to the Constitution of the United States, more particularly, in the onerous form of prior restraint, and of their right to equal protection of the laws guaranteed under the Fourteenth Amendment to the Constitution.
- 23. Under Section 1983 of Title 42 of the United States

 Code, Plaintiffs are further entitled to be paid
 attorney fees, costs and expenses incurred in the prosecution
 of this case. Plaintiffs are unable at this time to set forth
 the precise amount of such expenses, costs and attorney fees,
 but will present the figure and proof at the close of trial
 hereof.

THIRD CAUSE OF ACTION

- 24. This Cause of Action arises under the United States Constitution, particularly under the provisions of the First and Fourteenth Amendments to the Constitution of the United States.
- 25. This Court has jurisdiction of this cause under and by virtue of Section 1331 of Title 28 of the United States Code.
- 26. Plaintiffs reallege and incorporate herein by reference each and every allegation contained in Paragraphs 1, 2, 5 through 12 and 18 of this Complaint.
 - 27. Defendant asserts that its basis for refusal to

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28. Plaintiffs are informed and believe and thereon allege that the United States Congress, in enacting Sections 1461, 1462 and 1465 of Title 18 of the United States Code, has delegated to Kodak the responsibility of censoring the speech of Plaintiffs and all other customers who wish to use Defendant's unique processing ability. Thereby, the United States Congress has delegated to Kodak the judicial function of determining when photographs belonging to Plaintiffs and other of Kodak's customers are obscene, so as to justify the interference by the United States Government in the free and unfettered expression contained within said pictures.

29. As a result of the above-recited acts, Plaintiffs have been deprived by Defendant of Plaintiffs right to freedom of speech and press as guaranteed under the First Amendment to the Constitution, in the onerous form of prior restraint, and Plaintiffs have also been deprived of their right to equal protection of the laws guaranteed under the Fourteenth Amendment to the Constitution.

FOURTH CAUSE OF ACTION

30. Plaintiffs reallege and incorporate herein by reference each and every allegation contained in Paragraphs 1, 2, 5 through 12, 18, 24, 25, 27, and 29 of this

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- 31. Defendant asserts that its basis for refusal to return Plaintiffs' film is that the same depicts sexually explicit conduct.
- 32. Plaintiffs publish major magazines, distributed throughout the United States. Defendant knows or should know such fact.
- 33. The developing process is merely one step in the publishing process. Subsequent steps, insofar as photographs are concerned, include, among others:
 - A. Selection of photographs for publication utilizing artistic and technical criteria.
 - B. Cropping and airbrushing the photographs, when appropriate.
 - C. The addition of textual material in connection with the photographs.
 - D. Review, when appropriate, concerning the legal suitability of photographs.
- 34. Defendant knows or should know the facts alleged in Paragraph 33 of this Complaint and further that the photographs are published in a format which includes a substantial amount of additional material having significant literary, artistic, political and scientific value.
- 35. No statute, potentially applicable to Defendant, either state or federal, is intended to be applicable to an interim step in the publishing process. Consequently, Defendant's basis for refusing to return the photographs is untenable.

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- 36. Should any statute be interpreted as prohibiting the return of developed photographs where the developing of these photographs is merely an interim step in the publishing process of a magazine, that statute operates as a prior restraint and is unconstitutional both on its face and as applied to Plaintiffs.
- 37. Should any statute be interpreted as prohibiting the return of developed photographs where the developing of these photographs is merely an interim step in the publishing process, that statute creater an impermissible chilling effect upon Plaintiffs' speech.

WHEREFORE, Plaintiffs pray judgment as follows:

- That Defendant, as well as its officers, directors, employees, agents, and attorneys, be enjoined and restrained permanently and pending trial of this action as follows:
- (a) From further attempting to achieve or maintain a monopoly in the market for superior quality photofinishing.
- (b) Prom failing to return Plaintiffs' films to Plaintiffs on the basis of the subject matter of such films.
- That, pursuant to 15 U.S.C. § 15, Plaintiffs recover treble the amount of their damages, together with reasonable attorney fees and other costs.
- 3. That Section 311.2 of the California Penal Code be declared unconstitutional to the extent that it results in violation by Defendant of the constitutional rights

of Plaintiffs.

- 4. That Sections 1461, 1462 and 1465 of Title 28 of the United States Code be declared unconstitutional to the extent that they result in violation by Defendant of the constitutional rights of Plaintiffs.
- That the aforementioned actions of censorship and confiscation by Defendant be declared unconstitutional.
 - That Plaintiffs be granted reasonable attorney fees incurred by Plaintiffs.
 - 7. That Plaintiffs be granted their costs herein.
- 8. That Plaintiffs have such other, further and different relief that may be just, equitable and proper.

DATED: February 12, 1980

COOPER, EPSTEIN & HUREWITZ A Professional Corporation Attorneys for Plaintiffs

BY RICHARD D. AGAY

JOHN R. McDONOUGH J. STEVEN GREENFELD BALL, HUNT, HART, BROWN AND BAERWIT? 450 North Roxbury Drive, Suite 500 Beverly Hills, California 90210 4 (213) 278-1960 RECEIVED 5 Attorneys for Defendant APR 21 1980 Eastman Kodak Company 6 COOPER. EPSTEIN & HURSWITZ A P. C. 7 8 UNITED STATES DISTRICT COURT 9 CENTRAL DISTRICT OF CALIFORNIA 10 11 HUSTLER MAGAZINE, INC., a) CIVIL ACTION NO. 80 00561 JP corporation, and CHIC 12 MAGAZINE, INC., a corporation,) ANSWER TO COMPLAINT 13 Plaintiffs, 14 VS. 15 EASTMAN KODAK COMPANY, a corporation, 16 Defendant. 17 18 19

Defendant Eastman Kodak Company ("Kodak"), answering the complaint herein, admits, denies and alleges as follows:

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- 1. Alleges that Kodak is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 1 of the complaint respecting plaintiff Hustler Magazine, Inc. ("Hustler") and Chic Magazine, Inc. ("Chic").
 - 3. Admits paragraph 2 of the complaint.

4. Answering paragraphs 7 and 8 of the complaint alleges, on information and belief, that Hustler publishes a magazine distributed in various parts of the United States.

Kodak is without knowledge or information sufficient to form a belief as to the truth of the remaining averments of said paragraphs 7 and 8.

- 5. Denies paragraph 9 of the complaint, alleging that Kodak is unable to locate any sexually explicit color transparancies in its film processing laboratories that were withheld from orders submitted to those laboratories under the name of either plaintiff within one year last past.
- 6. Answering paragraph 10 of the complaint, alleges that Kodak has informed plaintiffs and others that Kodak will not return certain types of sexually explicit pictures if returning such pictures will subject Kodak or its employees or both to the risk of criminal prosectuion for violating obscenity laws. Attached as Exhibit A is a copy of a notice of Kodak's practice in this respect that was given by Kodak to Robert DeMarco, a representative of Hustler, on or about December 8, 1978. Attached as Exhibit B is a copy of a page in the current Kodak dealers catalogue that states the terms and conditions under which Kodak accepts any customer order that includes film used to record sexually explicit subject matter. Except as thus alleged, denies paragraph 10 of the complaint.

7. Denies paragraphs 11, 12, 13 and 14 of the complaint and alleges, on information and belief, that Hustler has for the past year continuously published and sold its magazines without using Kodak's film processing laboratories to develop film used to photograph sexually explicit subject matter of the kind described in Exhibit B.

- 8. Answering paragraph 15 of the complaint, Kodak incorporates by reference, as though fully set forth, Rodak's answers to paragraph 1, 2 and 5 through 12 of the complaint.
- 9. Denies paragraphs 16, 17 and 18 of the complaint and alleges that there are non-Kodak film processing laboratories which plaintiffs could use for processing Kodachrome film. In addition, plaintiffs could use non-Kodachrome film that is processed in non-Kodak film processing laboratories or plaintiffs could process their own film.
- 10. Answering paragraph 19 of the complaint and paragraph 20 insofar as it may relate to the allegations of paragraph 9, Kodak incorporates by reference, as though fully set forth, Kodak's answers to paragraphs 9 and 10 of the complaint.
- 11. Admits paragraph 20 of the complaint insofar as it relates generally to Kodak's policy, alleging that the specified California obscenity statute is only one of several criminal statutes of concern to Kodak.

- 12. Denies paragraphs 21, 22, 23, 24 and 25 of the complaint.
- 13. Answering paragraph 26 of the complaint, incorporates herein by reference, as though fully set forth, Kodak's answers to paragraphs 1, 2, 5 through 12, and 18 of the complaint.
- 14. Denies paragraph 27 of the complaint, alleging that Kodak is unable to locate any sexually explicit color transparancies in its film processing laboratories that were withheld from orders submitted to those laboratories under the name of either plaintiff within one year last past.
 - 15. Denies paragraphs 28 and 29 of the complaint.
- 16. Answering paragraph 30 of the complaint, hereby incorporates by reference, as though fully set forth, Kodak's answers to paragraphs 1, 2, 5 through 12, 18, 24, 25, 27 and 29 of the complaint.
- 17. Denies paragraph 31 of the complaint, alleging that Kodak is unable to locate any sexually explicit color transparancies in its film processing laboratories that were withheld from orders submitted to those laboratories under the name of either plaintiff within one year last past.
- 18. Answering paragraph 32 of the complaint, alleges, on information and belief, that a magazine published by Hustler

- 19. Answering paragraphs 33 and 34 of the complaint, admits that developed film is used in publishing pictures in magazines, alleges that such film can be developed by the publisher of a magazine, and alleges that Kodak is without knowledge or information sufficient to form a belief as to the truth of the remaining averments of said paragraph insofar as said averments may apply to plaintiffs.
- 20. Denies paragraphs 35, 36 and 37 of the complaint alleging, with respect to paragraph 35, that state and federal obscenity and other statutes apply to the operations of film processing laboratories that serve the public.

FIRST AFFIRMATIVE DEFENSE

This Court lacks jurisdiction over the subject matter of the action and of each and all of the claims for relief (each demoninated a "Cause of Action") purportedly stated in the complaint.

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SECOND AFFIRMATIVE DEFENSE

The complaint and each of the claims for relief purportedly alleged therein fails to state a claim upon which relief can be granted.

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THIRD AFFIRMATIVE DEFENSE

The provisions of Exhibit B state, in part, the terms upon which Kodak is willing to accept film for processing. Such terms constitute a part of the contract which defines the legal relationship between Kodak and its customer and the rights and duties of Kodak thereunder. Pursuant to such contract and relationship, Kodak has the right not to return to customers, including plaintiffs, pictures which depict sexually explicit conduct as described in Exhibit B.

FOURTH AFFIRMATIVE DEFENSE

On or about December 8, 1978 Kodak gave a copy of Ehxibit A to Robert DeMarco, a representative of Hustler. If Hustler has since sent or should in the future send to Kodak film which depicts sexually explicit conduct of the kind described in Exhibit A, Hustler has done so and will do so pursuant to a contract of which Exhibit A is a part. Pursuant to said contract and the legal relationship created thereby, Kodak has the right not to return to Hustler such film or products made therefrom. In addition, by reason of having

received Exhibit A Hustler is estopped from seeking the relief prayed in the complaint or by any of the claims for relief purportedly stated therein. If Exhibit A or the substance thereof has been communicated by DeMarco or Hustler to Chic, then this affirmative defense is also asserted against Chic.

FIFTH AFFIRMATIVE DEFENSE

Kodak's film processing laboratories refuse to return to customers sexually explicit negatives, transparancies or prints (hereinafter "pictures") discovered during routine operations performed in completing the customer's order when they believe that returning such pictures would subject Kodak or its employees or both to the risk of criminal prosecution for violating obscenity or other laws. Kodak believes that if its California film processing laboratories were to return to customers pictures that depict the types of subject matter described in Exhibit B, the act of doing so would subject Kodak and certain of its employees to the risk of criminal prosecution under obscenity statutes of the United States, California, and/or other states. Kodak has never declined or notified plaintiffs or anyone else that it would decline to return any pictures (1) for the purpose of enforcing against plaintiffs, Rodak customers, or others any statute, ordinance or governmental rule or policy respecting obscenity or (2) at the instance or request of the United States, the State of California, or any other governmental entity or agency.

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SIXTH AFFIRMATIVE DEFENSE

Kodak's film processing laboratories refuse to return to customers sexually explicit pictures discovered during routine operations performed in completing the customer's order when they believe that returning such pictures would subject Kodak or any employee or both to the risk of criminal prosecution as a conspirator, accomplice, accessory, aider or abettor, or otherwise in connection with the subsequent use by the customer of such pictures in violation of federal obscenity statutes, the California obscenity statute, or the obscenity laws of any other state.

SEVENTH AFFIRMATIVE DEFENSE

Kodak may not lawfully be compelled to enter into a contract with plaintiffs or others the performance of which would require Kodak to perform acts that it is reasonable to believe would be illegal and, if performed by Kodak, would subject Kodak or its employees or both to the risk of criminal prosecution. Any decision to the contrary would be inequitable.

EIGHTH AFFIRMATIVE DEFENSE

If plaintiffs or others send or deliver to a Kodak film processing laboratory in California by any means undeveloped film used to photograph obscene subject matter such as that described in Exhibit B, the film and any picture made from it are contraband.

Plaintiffs have no right to the possession of contraband and consequently there is no basis for granting the relief sought by plaintiffs against Kodak.

NINTH AFFIRMATIVE DEFENSE

If plaintiffs or others send or deliver to a Kodak film processing laboratory in California through interstate commerce or the U.S. mails undeveloped film used to photograph obscene subject matter, such as that described in Exhibit B, they violate federal law and it would be contrary to public policy for this Court to require Kodak to receive, process or return such film or pictures made therefrom or otherwise to aid plaintiffs in their illegal activities.

TENTH AFFIRMATIVE DEFENSE

If plaintiffs or others send or deliver to a Kodak
film processing laboratory in California, through interstate
commerce or the U.S. mails or by any other means, undeveloped
film used to photograph obscene subject matter, such as that
described in Exhibit B, they violate California law and it would
be contrary to public policy for this Court to require Kodak
to receive, process or return such film or pictures made therefrom
or otherwise to aid plaintiffs in their illegal activities.

ELEVENTE AFFIRMATIVE DEFENSE

Kodak is legally entitled and obligated to establish terms and conditions upon which its film processing laboratories will accept, process and return film and pictures. In doing so Kodak is legally entitled and obligated to ensure that its film processing laboratories and their employees operate lawfully and any requirement by a court that Kodak do otherwise would be contrary to public policy.

TWELFTH AFFIRMATIVE DEFENSE

Kodak is obligated to operate its film processing laboratories in such a way that Kodak's employees are not personally subjected to the risk of criminal prosecution by reason of performing routine acts required by the terms of their employment. A requirement that Kodak operate in any other manner would be inequitable and contrary to public policy.

WHEREFORE, Kodak prays:

- That plaintiffs take nothing by the complaint and the same be dismissed, with prejudice;
 - That Kodak be awarded its costs of suit herein;

and / / /

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 That Kodak have such other, further and different relief as may be just, equitable and proper.

DATED: April 14, 1980.

BALL, HUNT, HART, BROWN AND BAERWITZ

JOHN R. McDonOUGH Abtorneys for Defendant (Eastman Kodak Company

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NOTICE

Because of Federal and State laws relating to pornography, Eastman Rodak does not wish to handle pictures that show sexually explicit conduct. Our Legal Department has informed us that processing pictures for customers depicting the following subject matter may subject Kodak to potential criminal prosecution:

- (a) Ultimate sexual acts, normal or perverted, actual or simulated.
- (b) Masturbation, excretory functions or lewd exhibition of genitals.

Film sent to Kodak for processing which depicts such subject matter will not be returned because of the potential legal problems mentioned above.

EASTMAN KODAK COMPANY "... 1017 NORTH LAS PALMAS AVENUE - LOS ANGELES, CALIFORNIA 80038 - 213 455-7151

neral Terms (continued)

Varranty and !Imitations of Liability

stat: products are sold without warranty or Sability of any kind, except at which is stated on, is packaged with, or accompanies such product, and, with respect to the sale, use, processing and handling of the applicable familiation of the applicable familiation of

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Cades films will be replaced if defective in manufacture, labeling, or stogong, or if damaged or lost by us or any subsidiary company, cept for such replacement, the sale, processing, or other handling of se films is without warranty or liability, even shough defect, damage, loss is caused by negligenics or other fault. Since color dyes may in e change, color films will not be replaced for, or otherwise warranted any change in color.

ocessing Service

on Policy—The return of any film or print to us for processing or nurpose will constitute an agreement by you that if any such it is damaged or lost by us or any subsidiary company it will aced with an equivalent amount of unexposed Kodek film and eeing. Except for such replacement, the handling of such film or s by us a without warranty or kability even though damage or loss id by negligence or other fault.

By Explicit Pictures Policy—There are state and federal statutes in prohibit the distribution of pictures depicting certain types of ally explicit conduct. When Kodax discovers pictures in a cuer order depicting such conduct. It cannot return those pictures to mer without risking criminal prosecution for violating the law and this possibility. Kodak will not return such pictures to the ner. Instead a notice will be sent to the customer stating that the res have been withheid and requesting permission to destroy the

in accordance with laderal and state laws, pictures depicting the following types of conduct will not be returned to cusmers by Kodak when they are discovered during the comple allomer order:

- Actual or amulated acts of sexual intercourse, historosexual or homosexual, normal or pervented.
 Masturbation, excretory functions or level exhibition of penidals.
- 3. Bestiality, flagellation, or other types of sexually moti-

Easman Kodak Company also reserves the right to refuse to reproduce pictures depicting sexual or eperant conduct which are extends the categories of conduct described in applicable laws. Kedak will use its discretion in determining whether to complete the customer order in auch priussons. When Kodak chooses not to reproduce pictures of this type, they will be returned to the customer since doing so should not audject the company to possible criminal prosecution. A nosce will accompany the returned pictures giving the reason \$\(\text{Av} \) were not

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Attorneys for Defendant Eastman Kodak Company RECEIVED

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HUSTLER MAGAZINE, INC., a corporation, and CHIC MAGAZINE, INC., a corporation,

Plaintiffs.

VS.

EASTMAN KODAK COMPANY, a corporation,

Defendant.

CIVIL ACTION NO. 80 00561 IH

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; AFFIDAVITS, DECLARATIONS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on June 30, 1980 at 10:00 A.M. or as soon thereafter as counsel may be heard, in the Courtroom of the Honorable Irving Hill, located in the United Stated Courthouse, 312 North Spring Street, Los Angeles, California, defendant Eastman Kodak Company ("Kodak"), a corporation, will and does hereby move the Court for summary judgment in said defendant's favor and against plaintiffs

Hustler Magazine, Inc. ("Hustler") and Chic Magazine, Inc. ("Chic").

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This motion is made pursuant to Rule 56 of the Federal Rules of Civil Procedure on the grounds that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law because

- (1) This Court lacks jurisdiction over the subject matter of the action and of each and all claims for relief (each denominated a "Cause of Action") purportedly stated in the complaint;
- (2) Plaintiffs' purported "First Cause of Action"
 fails to state a claim upon which relief can be granted for
 alleged violation of Section 1 of the Sherman Antitrust Act
 because plaintiffs nowhere allege a plurality of actors forming
 the necessary "contract, combination or conspiracy" in order to
 satisfy the essential element or a Sherman §1 violation;
- (3) Plaintiffs' allegation that defendant Kodak has obtained and has attempted to obtain a monopoly of the film finishing market and/or the "superior quality photofinishing" market is untrue;
- (4) Assuming, arguendo, that the allegations in plaintiffs' purported "First Cause of Action" which are intended to state a claim under Section 2 of the Sherman Act are true,

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(5) Assuming, arguendo, that the allegations in plaintiffs' purported "First Cause of Action" which are intended to state a claim under Section 2 of the Sherman Act are true, plaintiffs are not entitled to injunctive relief under Section 16 of the Clayton Act for their alleged irreparable injury by reason of the alleged violation of Section 2 of the Sherman Antitrust Act because, as shown by the affidavit of Reynolds Allinger and the declarations of Oscar Shock and Larry B. Stevenson filed herewith, Kodak does not in fact have a monopoly as alleged in that there are readily available film processing laboratories other than Kodak's capable of achieving a quality of product adequate to meet plaintiffs' needs. Moreover, plaintiffs nowhere allege that Kodak's challenged practice of withholding certain transparencies depicting sexually explicit conduct has prevented plaintiffs from publishing marketable magazines;

(6) Plaintiffs' purported "First Cause of Action" fails to state a claim upon which relief can be granted for violation of Section 2 of the Sherman Antitrust Act because Rodak's limited refusal to develop and return transparencies that depict sexually explicit conduct has no anticompetitive

effect and plaintiffs nowhere allege that the challenged practice of Kodax is motivated by a specific intent to control prices, exclude competition, or engage in other anticompetitive behavior or that said practice has any such consequences;

(7) Plaintiffs' purported Second and Third "Causes of Action" fail to state claims upon which relief can be granted in respect of plaintiffs' alleged deprivation of rights under Section 1983 of Title 42 of the United States Code and the First and Fourteenth Amendments to the United States Constitution because, as shown by the affidavit of Norman McClaskey, Kodak's policy and practice is its own and is not adopted or followed at the request of any government official or agency. Plaintiffs nowhere allege the requisite significant governmental action and involvement in the challenged practice of Kodak and the affidavit of Norman D. McClaskey establishes that no such governmental action exists;

(8) The Court does not have jurisdiction to determine plaintiffs' purported "Fourth Cause of Action" for declaratory relief as to the constitutionality of federal and state obscenty statutes because this case lacks the concrete adverseness as between plaintiffs and Kodak necessary to create a justiciable "controversy" within the meaning of the Declaratory Judgment Act and Article III, Section 2 of the United States Constitution; and

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(9) Rodak has been unable to locate any color negatives, transparencies, film or other property in its possession that were submitted under the name of either plaintiff during the period from February 13, 1979 to present.

Should Rodak prevail on this motion, Rodak seeks as an item of costs its reasonable attorney's fees incurred in defending this action, to be awarded pursuant to 42 U.S.C. \$1988 and the inherent powers of this Court, on the grounds that plaintiffs have commenced this action as a frivolous invocation of the Court's judicial process and for reasons of harassment and oppression.

This motion will be based on this notice of motion and motion, the attached affidavits and memorandum of points and authorities, and upon all the pleadings, papers and documents on file in this action.

JOHN R. McDONOUGH J. STEVEN GREENFELD BALL, HUNT, HART, BROWN AND BAERWITZ

y: Y

Attorneys for Defendant Eastman Kodak Company

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INTRODUCTION

A. Plaintiffs' Allegations.

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Plaintiffs, publishers of Hustler and Chic Magazines, filed this action Pebruary 13, 1980 seeking injunctive relief, damages and a declaratory judgment. The complaint in this action arises out of and challenges defendant Rodak's policy and practice of refusing to return to customers sexually explicit pictures* discovered during routine film developing operations performed in completing the customer's order when Rodak believes that returning such pictures might subject Rodak and/or its employees to the risk of criminal prosecution for violating federal and state obscenity laws.

Plaintiffs allege that within one year prior to filing their complaint, Kodak refused to return to plaintiffs various color transparencies which had been developed from film transmitted to Kodak by plaintiffs for development. [Complaint, p. 3, 1s. 19-22.] Moreover, plaintiffs allege that Kodak has

^{*} As used herein, "pictures" includes processed or developed film, negatives, color transparencies, and other materials normally returned to a customer who sends Kodak exposed film for processing.

informed plaintiffs that it will refuse to return any film belonging to plaintiffs if such film contains certain sexually explicit subject matter. [Complaint, p. 3, 1s. 24-27.]

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Plaintiffs further allege that Kodak has monopolized and attempted to monopolize trade and commerce in the commercial color film photofinishing and developing business in violation of the Sherman Antritrust Act. [Complaint, p. 2, ls. 7-28.] Plaintiffs allege that the result of this asserted monopoly behavior is that Kodak has achieved a monopoly in the market for "superior quality photofinishing" and that those who require superior quality film developing "must use" the services of Kodak. [Complaint, p. 3, ls. 3-5.]

Plaintiffs further allege that (1) they are and, at all relevant times mentioned in the complaint, have been engaged in the business of publishing magazines and distributing them in interstate commerce [Complaint, p. 3, 1s. 6-13]; (2) until Kodak's refusal to return various pictures to plaintiffs, plaintiffs relied solely upon Kodak's developing process for the photographs used to print pictures in their magazines because of the significantly superior quality of Kodak's photofinishing [Complaint, p. 3, 1s. 14-18] and (3) as a result of Kodak's refusal to return various pictures to plaintiffs, plaintiffs have incurred at least \$10,000 in damages which they seek to treple pursuant to Section 4 of the Clayton Act. [Complaint, p. 3, 1. 28 - p. 4, 1s. 1-8.]

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In addition to money damages, plaintiffs seek to have Kodak enjoined from alleged further refusals to return plaintiffs' pictures or from further attempts to create or maintain its alleged monopoly. [Complaint, p. 4, ls. 9-13.] Plaintiffs allege that unless such injunctive relief is granted they will suffer irreparable injury in the following respects:

A. It would be extremely difficult, if not impossible, to measure the damages suffered by Plaintiffs as a result of Defendant's refusal to return certain films.

B. The quality of Plaintiffs' magazines will be substantially lowered. There is no way in which the injury resulting from this decrease in quality can be measured.

C. Plaintiffs' ability to exercise their rights of free speech and press will be irreparably harmed. [Complaint, p. 4, ls. 9-25.]

Plaintiffs also seek their reasonable attorney's fees pursuant to Section 4 of the Clayton Act. [Complaint, p. 5, ls. 9-15.]

As a purported "Second Cause of Action", plaintiffs claim that Kodax's alleged refusal to return various pictures to plaintiffs constitutes a deprivation, under color of California law, of their constitutional rights to free speech and press.

[Complaint, p. 7, ls. 2-9.] Plaintiffs allege that because

Rodak's reason for refusing to return certain pictures to plaintiffs is that Rodak would thereby subject the company and/or its employees to the risk of criminal prosecution under California obscenity statutes, the California Legislature has delegated to Rodak the responsibility of censoring the speech of all customers who wish to use Rodak's film processing to develop such pictures. [Complaint, p. 6, ls. 15-27.] Plaintiffs seek their reasonable attorney's fees pursuant to Section 1983 of Title 42 of the United States Code. [Complaint, p. 7, ls. 10-16.]

As a purported "Third Cause of Action", plaintiffs allege that Kodak's alleged refusal to return various pictures to plaintiffs constitutes a deprivation of their rights to free

speech and press and equal protection of the laws under the

First and Fourteenth Amendments to the United States Constitu-

17 tion. [Complaint, p. 8, 1s. 18-24.]

As a purported "Fourth Cause of Action", plaintiffs seek a declaratory judgment that certain federal and state obscenity statutes are unconstitutional to the extent that they may be interpreted as prohibiting a film processing company from returning sexually explicit pictures where the developing of such pictures "is merely an interim step in the publishing process or a magazine." [Complaint, p. 10, 1s. 24-28 - p. 11, 1s. 1-11.]

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As shown by the affidavits of Robert R. Ziegler,

J. Bruce Martin, David G. Lynch, John M. Welch, Thomas P.

Spiess, J. Warren Fields, Thomas J. Spillman, Douglas Lee, Phil
Thomas Elliott, Jr. and Donald J. Maeder (hereinafter "the
Customer Service or Laboratory Managers' Affidavits"), Kodak is
unable to locate any sexually explicit color transparencies
withheld from orders submitted to any its film processing
laboratories within the last year under the name of either
plaintiff.

It is true that Kodak has informed plaintiffs and others that Kodak will not return certain types of sexually explicit pictures because Kodak believes that returning such pictures will subject Kodak and/or its employees to the risk of criminal prosecution for violating obscenity laws. Specifically, Kodak does not return to customers pictures discovered during the completion of a customer order which depict the following types of conduct:

- Actual or simulated acts of sexual intercourse, heterosexual or homosexual, normal or perverted.
- Masturbation, excretory functions or lewd exhibition of genitals.
- Bestiality, flagellation, or other types of sexually motivated sadomasochistic behavior.

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A statement of Kodak's general practice not to return such sexually explicit pictures is contained in the current Kodak dealers catalog, which states the terms and conditions under which Kodak accepts any customer order; a copy thereof is attached as Exhibit B to the Affidavit of Norman D. McClaskey ("McClaskey Affidavit"). Attached as Exhibit A to the Declaration of Floyd Fischer is a copy of the following notice of Kodak's practice in this respect that was given by Kodak to Robert DeMarco, a representative of Bustler, on or about December 8, 1978 [Declaration of Floyd Fischer, p. 2.]:

NOTICE

Because of Federal and State laws relating to pornography, Eastman Kodak does not wish to handle pictures that show sexually explicit conduct. Our Legal Department has informed us that processing pictures for customers depicting the following subject matter may subject Kodak to potential criminal prosecution:

- (a) Ultimate sexual acts, normal or perverted, actual or simulated.
- (b) Masturbation, excretory functions or lewd exhibition of genitals.
 Film sent to Kodak for processing which depicts such subject matter will not be

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returned because of the potential legal problems mentioned above.

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Inasmuch as Hustler and Chic are affiliated publishing entities, it is reasonable to believe that notice of Kodak's practice as to the return of sexually explicit pictures had been effectively communicated and thus was known to both plaintiffs at all times during the year preceding their commencement of this action.

The allegation that Kodak has a monopoly of the development of Kodachrome film and/or of "superior quality film rinishing" is untrue. As shown by the Affidavit of Reynolds Allinger ("Allinger Affidavit"), there are numerous non-Kodak film processing laboratories readily available to plaintiffs in California which are capable of (a) developing Kodachrome film and (b) developing Ektachrowe film which is substantially equivalent to Kodachrome film for plaintiffs' purposes and needs. These non-Kodak laboratories are capable of achieving the same quality film development and reproduction as the Kodak processing laboratories. [Allinger Affidavit, pp. 7-8.] Furthermore, if plaintiffs were to use Ektachrome professional film in preparing and publishing photographs for their magazines - a film less expensive and easier to process than Kodachrome film, yet capable of producing pictures for plaintiff's purposes at least as good as pictures produced from Kodachrome film tney could achieve a high quality "in house" film processing capability for an investment of approximately \$15,000. [Allinger Affidavit, p. 13.] Therefore, plaintiffs' allegation that

they "must use" Kodak's processing laboratories in order to achieve superior quality film developing is untrue.

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The allegations that Kodak is acting to enforce California and federal obscenity statutues (purported Third and Fourth "Causes of Action") are also untrue. As shown by the McClaskey Affidavit, Kodak's policy of not returning certain types of sexually explicit pictures was formulated unilaterally and it is based on the business consideration of avoiding the injury and/or expense to the company or its employees that would result if Kodak and/or its employees were accused of violating the obscenity laws. This policy was not formulated (a) at the request of, in cooperation with or with the knowledge of law enforcement authorities or (b) with the intent of purpose of suppressing the publication or distribution of sexually explicit magazines. [McClaskey Affidavit, p. 5.] Kodak's only motivation for adopting its challenged policy and practice relating to the return of certain sexually explicit pictures is its belief that returning such pictures might subject Kodak and/or its employees to the risk of being charged with or criminally prosecuted for violating constitutionally valid state and federal obscenity laws. [McClaskey Affidavit, pp. 5-6.] 11 11 11

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SUMMARY OF ARGUMENT

The following are the bases for Kodak's motion for summary judgment.

- Kodak has the contractual right to refuse to return sexually explicit pictures to plaintiffs.
- 2. Plaintiffs' first alleged "cause of action"
 purports to state a claim based on a combination in restraint of
 trade in violation of Section 1 of the Sherman Antitrust Act.
 However, this claim must fail because plaintiffs nowhere allege
 the plurality of actors forming the necessary "contract,
 combination or conspiracy" within the meaning of Sherman \$1.
- 3. Plaintiffs' first alleged "cause of action" also purports to allege claims of monopolization and attempt to monopolize the market of Kodachrome film finishing and/or "superior film finishing" in violation of Section 2 of the Sherman Act. These claims for relief also fail for various independently sufficient reasons. Pirst, Kodak's affidavits submitted in support of this motion demonstrate that no such monopoly exists; there are many non-Kodak film processing laboratories readily available to plaintiffs which are capable of achieving the same quality of film processing as Kodak's laboratories. Second, even if the alleged monopoly and/or

attempt to monopolize the described market existed, plaintiffs would not have standing to recover treble damages and attorney's fees under Section 4 of the Clayton Act because plaintiffs are not within the "target area" of the economy endangered by Kodak's alleged antitrust violation. This is because Kodak's limited refusal to develop plaintiffs' sexually explicit pictures has no anticompetitive effect; rather than contributing to a preakdown of economic conditions in the photofinishing and developing market, Rodak's policy generates added business for Kodax's competitors, thereby promoting rather than restraining competition. Third, plaintiffs' allegation that Kodak has attempted to monopolize interstate trade and commerce in film developing [Complaint, p. 2, ls. 10-11] does not state a claim for relief under Sherman \$2 because there is no allegation that Kodak was motivated in its allegedly anticompetitive practice by a specific intent to control prices or exclude competition. Fourth; plaintiffs are not entitled to injunctive relief under Section 16 of the Clayton Act because they have alleged no irreparable injury to them by reason of the alleged antitrust violation. Plaintiffs nowhere allege that Kodak's challenged practice of withholding certain sexually explicit pictures has in any way prevented plaintiffs from publishing marketable magazines.

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purports to arise under Section 1983 of Title 42 of the United
States Code and their alleged third and fourth "causes of

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action" purport to arise under the First and Fourteenth Amendments to the United States Constitution. These allegations state no claim within the jurisdiction of this Court to adjudicate. These constitutional and statutory provisions prohibit only State denials of civil rights and equal protection of the laws and Congressional abridgements of the freedom of speech, not private action. Accordingly, plaintiffs' claims for relief alleged in their second, third and fourth causes of action require proof that the challenged practice of Kodak involved significant governmental action and participation. No such showing has or can be made. True, plaintiffs allege that the grant of exclusive patent and trademark rights to Kodak by federal and state governments make Kodak's actions "state action", but this position is refuted by authorities cited and discussed below. Plaintiffs also allege that certain federal and state obscenity statutes "delegate" governmental censorship functions to Kodak. However, as shown by the McClaskey Affidavit, Kodak's policy of not returning certain types of sexually explicit picutres was formulated unilaterally and not (a) at the request of, in cooperation with or with the knowledge of law enforcement authorities or (b) with the intent of purpose of participating in the enforcement of the obscenity laws or censoring or suppressing the publication or distribution of sexually explicit magazines.

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5. Plaintiffs' purported fourth cause of acton seeks declaratory relief as to the constitutionality of certain federal and state obscenity statutes. However, this Court does

not have jurisdiction in this action to determine whether plaintiffs are entitled to such relief because this case lacks the concrete adverseness necessary to creat a justiciable "controversy" between plaintiffs and Kodak within the meaning of Article III, Section 2 of the United States Constitution and the Declaratory Judgment Act. Kodak has no interest in defending the constitutionality of various obscenity statutes or obtaining any particular interpretation of them.* Kodak is only interested in obeying the laws as Kodak believes those laws may be interpreted and enforced by governmental authorities. Therefore, this case does not present the exigent adversity which is an essential condition precedent to federal court adjudication.

6. Assuming that plaintiffs have alleged and could prove some proprietary interest in sexually explicit pictures withheld by Kodak's processing laboratories, plaintiffs' claims for relief arise out of an alleged contractual relationship and are essentially state law-based claims in the nature of trover, conversion or replevin. Such claims for relief are not within the subject matter jurisdiction of this Court. Plaintiffs'

^{*} Quite to the contrary, upholding these laws is not in Kodak's financial interest since withholding pictures increases the costs incurred by Kodak in processing film, alienates customers and has resulted in Kodak's incurring substantial expense due to litigation such as the instant case.

attempts to masquerade their state-law claims in this federal court action as antitrust, civil rights and related claims made pursuant to the Constitution and the laws of the United States are plainly without merit. To the extent that plaintiffs are entitled to any relief by reason of Kodak's practice as to the return of sexually explicit pictures, plaintiffs must seek recovery in an action now pending in the state court alleging various causes of action under state law arising out of the transactions alleged in the instant complaint.*

 Rodak Has The Contractual Right to Refuse to Return Sexually Explicit Pictures to Plaintiffs.

The provisions of Exhibits A and B attached to the McClaskey Affidavit state, in part, the terms upon which Kodak is willing to accept film for processing. Such terms constitute

^{*} Plaintiffs have filed action No. C 313 377 in the Superior Court of the State of California for the County of Los Angeles against Kodak and Doe defendants alleging wrongful possession and detention by Kodak of color film transparencies belonging to plaintiffs and seeking the similar injunctive and declaratory judgment relief under state laws as sought in the instant complaint. Granting of this summary judgment motion will not leave plaintiffs without a judicial forum within which to air their grievances.

a part of the contract which defines the legal relationship between Kodak and its customers and the rights and duties of Rodak thereunder. Pursuant to such contract and relationship, Kodak has the contractual right not to return to customers, including plaintiffs, pictures which depict the kind of sexually explicit conduct described in Exhibits A and B. Since Bustler and, presumably, Chic received in December, 1978 written notice of Kodak's policy and practice with respect to the conditions under which Kodak will process and return film development orders (Exhibit A), these plaintiffs became bound by the terms and conditions thereof. Therefore, if, within the last year, plaintiffs had sent film to Kodak to process with knowledge of Kodak's policy and practice as to the return of sexually explicit pictures, plaintiffs would have accepted and become bound by the terms of Kodak's conditional undertaking to process film.

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No Sherman \$1 Violation is Stated in the Complaint or Shown in Pact.

Section 1 of the Sherman Act (15 U.S.C.) §1 provides, in relevant part, as follows:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal

The elements of a Sherman §1 violation may be broken down as follows:

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- (1) There must be at least two persons acting in concert ("contract, combination or conspiracy");
- (2) The restraint complained of must restrain interstate or foreign commerce; and
- (3) Except in the case of certain "per se" violations, it must be an unreasonable restraint.

Plaintiffs' purported first cause of action seeks relief, in part, under Sherman §1. [Complaint, p. 2, 1s. 1-4.] However, plaintiffs nowhere allege a plurality of actors forming the necessary "contract, combination or conspiracy" in order to satisfy the first element of a Sherman §1 violation. Concerted action by a corporation and its officers and/or employees does not constitute a "contract, combination or conspiracy" within the meaning of Sherman \$1. Harvey v. Fearless Farris Wholesale, Inc., 589 F.2a 451, 455 fn. 7 (9th Cir. 1979); Spectrofuge Corp. v. Beckman Instruments, Inc., 575 F.2d 256, 287 (5th Cir. 1978), cert. denied 440 U.S. 939, 99 S.Ct. 1289 (1979); Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 82 (9th Cir. 1969), cert. denied 396 U.S. 1062, 90 S.Ct. 752, 24 L.£d.2d 755, reh. denied 397 U.S. 1003, 90 S.Ct. 1113 (1970). Plaintiffs only allege illegal activities on the 28 part of Kodak. Therefore, no Sherman \$1 violation is stated.

- Plaintiffs Do Not Have a Claim For Relief Under Section 2 of the Sherman Act.
- A. Kodak Does Not Have Monopoly Power in the General Photofinishing and Film Development Market or of Any Submarket Which Plaintiffs May Allege.

Section 2 of the Sherman Act (15 U.S.C. $\S 2$) provides, in relevant part, as follows:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony,

There are three separate offenses proscribed in Sherman §2: (1) actual monopolization; (2) attempts to monopolize; and (3) conspiracies to monopolize. Plaintiffs have only alleged the first two offenses in their complaint; viz. that Kodak "has monopolized and attempted to monopolize interstate trade and commerce in film developing." [Complaint, p. 2, ls. 10-11.]

Actual monopolization has been defined in terms of the following elements:

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(1) The defendant's possession of monopoly power in the relevant market; and

 (2) The defendant's willful acquisition or maintenance of that monopoly power as distinguished from growth or development as a consequence of a superior product or of superior business acumen. United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778 (1966); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 274 (2d Cir. 1979), cert. denied, U.S. __, 100 S.Ct. 1061 (1980). The plaintiffs have the burden of establishing both of these elements in order to prove monopolization in violation of Sherman \$2. Purex Corp. v. Procter & Gamble Co., 596 F.2d 881, 890 (9th Cir. 1979).

The United States Supreme Court has defined monopoly power as "the power to control prices or exclude competition".

United States v. E.I. duPont de Nemours & Co., 351 U.S. 377,

391, 76 S.Ct. 994, 1005, 100 L.Ed. 1264 (1956); Accord, Grey-hound Computer v. International Business Machines, 559 F.2d 488,

496 (9th Cir. 1977), cert. denied, 434 U.S. 1040, 98 S.Ct. 782,

54 L.Ed.2d 740 (1978).

Plaintiffs' allegations define the relevant market in various terms. At one point, it is described as "the field of commercial color picture photofinishing and developing".

[Complaint, p. 2, 1s. 26-28.] Kodak does not have a sufficient

share of the national or California or Los Angeles film processing market to qualify Kodak as a monopolist within the meaning of Sherman §2. As held in the recent case of Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), cert. denied, ______, 100 S.Ct. 1061 (1980), as of 1976 Kodak's market share was only 10% of the national photofinishing market. The court also noted that there are six hundred independent photofinishers nationwide, including Berkey Photo. Berkey Photo, Inc. v. Eastman Kodak Co., supra, 603 F.2d at 271.

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If the complaint herein be read as alleging that Kodak has a monopoly of the Kodachrome film developing market or of a market of "superior film finishing" or of a market of finishing film suitable for plaintiffs' publication purposes (none of which Rodak admits as proper market definitions), the allegations are not true, as shown by the Allinger Affidavit and the declaration; of Oscar Schock ("Schock Declaration") and Larry B. Stevenson ("Stevenson Declaration"). In the first place, there are 27 non-Rodak film processing laboratories in various parts of the United States that develop Kodachrome film compared with a total of 10 Kodak laboratories. Seven of these non-Kodak laporatories are located in California compared to two Kodak laboratories. [Allinger Affidavit, pp. 5-6; Schock Declaration, pp. 2-3.] These non-Rodak laboratories, readily available to plaintiffs, are capable of achieving the same quality of Rodachrome film development and reproduction as Kodak's laboratories. They are also capable of producing Kodachrome transparencies suitable for plaintiffs' purposes. [Allinger

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In addition, there are at least 300 non-Kodak film processing laboratories in California. [Allinger Affidavit, p. 10.] Of this number, at least 107 of these non-Kodak film processing laporatories are Ektachrome professional laboratories that cater to the needs of professional photographers using Ektachrome film By contrast, Rodak has only two processing laporatories in California which process both Kodachrome and Extachrome films and neither of these laboratories cater to the needs of professional photographers. [Allinger Affidavit, p. 10.] Some of these non-Kodak processing laboratories which process Ektachrome film are capable of achieving the same quality of product as Kodak's own film processing laboratories. [Stevenson Declaration, p. 4.] Rodachrome and Ektachrome professional films are functionally interchangeable in terms of their potential for quality film finishing and in terms of producing pictures suitable for reproduction in magazines like plaintiffs'. [Allinger Affidavit, pp. 9, 11.] Indeed, in the magazine publishing industry Ektachrome film is commonly used in making printing plates whether or not the original image sought to be printed was produced on Kodachrome film. (Allinger Affidavit, p. 12.1

Furthermore, plaintiffs could choose to use Ektachrome film in photographing subject matter to be published in their magazines and develop their own "in house" high quality film processing capability for an investment of approximately

\$15,000. [Allinger Affidavit, p. 13.] Therefore, there is no merit whatever to plaintiffs' claim that they "must use" Kodak's processing laboratories in order to achieve a quality of film processing sufficient for their puplishing purposes.

To summarize, the Allinger Affidavit demonstrates that there are many more non-Kodak film processing laboratories than Kodak processing laboratories in California. Moreover, many of these non-kodak processing laboratories are capable of achieving the high quality of film reproduction claimed by plaintiffs to be necessary for their publishing purposes. These film processing laboratories compete with Kodak's in terms of services offered, prices and customers. 'In view of these facts, plaintiffs' allegation that Kodak possesses monopoly power over the film processing market in California, or any part thereof, is plainly specious and a boldface attempt to foist upon this Court an action not within its limited subject matter jurisdiction.

B. Even if Kodak Did Have a Monopoly Position in a
Relevant Market that Could Violate Section 2 of
the Sherman Act, Kodak's Policy of Refusing to
Process Certain Types of Sexually Explicit Film
Would Not Give Plaintiffs Standing to Claim Treble
Damages and Attorney's Fees Under Clayton Act, §4.

Section 4 of the Clayton Act (15 U.S.C. §15) provides an antitrust remedy as follows:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount of controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

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The essential elements for standing under Clayton \$4 may be broken down as follows:

- (1) the plaintiff must be a "person" within the meaning of the statute (defined as including corporations -- 15 U.S.C. §12);
- (2) a violation of the antitrust laws must in fact have occurred;
- (3) The antitrust law violated must be one within the meaning of Clayton §4 (defined as referring exclusively to the Sherman Act, Clayton Act, and parts of the Wilson Tariff Act -- National Milk Co. v. Carnation Co., 355 U.S. 373, 375-76, 78 S.Ct. 352, 353-54, 2 L.Ed.2d 340 (1958));

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- (5) there must be a direct and causal relationship between the antitrust violation and the plaintiff's injuries; and
- (6) plaintiff's injuries suffered must be measurable to some degree in dollars.

All six of these elements are interdependent and must exist in order to confer Clayton \$4 standing upon a particular plaintiff.

13 Von Kalinowski, Antitrust Laws and Trade Regulation, \$99.04, pp. 99-5 - 99-9 (1979).

The announced purpose of the Clayton \$4 treble damages and attorney's fee remedies is to deter antitrust violators by depriving them of the fruits of their violations as well as to compensate victims of violations for their injuries. <u>Laughlin v. Wells</u>, 446 P.Supp. 48, 53 (C.D. Cal. 1978).

Federal courts have long recognized that the possibilities of interpreting Clayton §4 to afford relief to all plaintiffs whose injuries may in some sense be causally related to an antitrust violation are virtually limitless. They have also recognized that such an all-inclusive interpretation would involve punitive and potentially disastrous judgments for treble damages and attorney's fees as well as a potential threat

of duplicative recoveries - if, for example, many different plaintiffs along a distribution chain were to sue for treble damages based on the same antitrust violation. Therefore, the courts have developed a restrictive \$4 standing doctrine "so as to confine the availability of section 4 relief only to those individuals whose protection is the fundamental purpose of the antitrust laws." In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 125 (9th Cir. 1973), cert. denied sub. nom. Morgan v. Automobile Manufactures Association, Inc., 414 U.S. 1045, 94 S.Ct. 551, 38 L.Ed.2d 336.

The fifth element for standing under Clayton \$4, as described above, is that there must be a direct and causal nexus between the antitrust violation and the plaintiff's injury. The Ninth Circuit Court of Appeals has adopted what the court has denominated the "target area" approach in order to determine whether a given plaintiff has satisfied the causation element of Clayton \$4 standing. Solinger v. A & H Records, Inc., 586 P.2d 1304, 1310 (9th Cir. 1978), cert. denied, U.S. _____, 99 S.Ct. 1999 (1979); In Re Airport Car Rental Antitrust Litigation, 474 F.Supp. 1072, 1104-05 (N.D. Cal. 1979).

The "target area" approach focuses on the plaintiff's relationship to the market affected by defendant's alleged antitrust activity. The plaintiff must show that he is "'within that area of the economy [i.e., market] which is endangered by a breakdown of competitive conditions in a particular industry.

Otherwise he is not injured 'by reason' of anything forbidden in

the anti-trust laws.' In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, supra, 481 F.2d at 128 (citation omitted).

 A court's application of the "target area" approach reduces to a two-step analysis:

First, it will identify the area of the economy [i.e., market] that was the target of defendants' allegedly anticompetitive conduct. Then, it will determine whether plaintiff's alleged injury occurred within that target area. In Re Airport Car Rental Antitrust Litigation, supra, 474 F.Supp. at 1104-05 (footnote omitted; citation omitted).

In <u>Hoopes v. Union Oil Co. of California</u>, 374 F.2d 48u, 485 (9th Cir. 1967), the court included an element of foreseeability in its definition of "target area":

"the area which it could be reasonably be foreseen would be affected" by the anti-trust violation. <u>Hoopes v. Union Oil Co. of California</u>, <u>supra</u>, 374 F.2d at 485; <u>See also Solinger v. A & M Records</u>, <u>Inc.</u>, <u>supra</u>, 586 F.2d at 1311.

applying the "target area" test, the Court of Appeals has denied recovery to private action plaintiffs in a number of

relevant cases. Essentially, the Court's inquiry has been whether the plaintiff's alleged injury is an immediate, and thus necessarily intended, consequence of the antitrust activity. For example, in Contreras v. Grower Shipper Vegetable Association of Central California, 1971 Trade Case 9 73,592 (N.D. Cal. 1971), affd., 484 F.2d 1346 (9th Cir. 1973), cert. denied, 415 U.S. 932, 94 S.Ct. 1445, 39 L.Ed.2d 490 (1974), plaintiff farmworkers employed by lettuce growers and shippers asserted antitrust injury in the form of decreased working hours because of the defendants' alleged conspiracy to raise the price of lettuce by cutting back on production. The court held that these farmworkers were not within the target area of the conspiracy to raise the price of lettuce and granted a motion to dismiss. The court's reasoning was that the purpose of the conspiracy was to raise the price of lettuce to consumers, and injury to the farmworkers was not necessary to achieve that purpose, even though it might follow as the logical result. The court stated its interpretation of the standing test as follows:

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. . . there is standing only when the injury to the plaintiff is the necessary consequence of an act, intended to further the economic concentration sought by the defendants, which <u>must</u> occur to achieve that end. Contreras v. Growers Shipper Vegetable Association of Southern California, <u>supra</u>, 1971 Trade Case at p. 90,453 (emphasis in original).

Similarly, in Gutierrez v. E & J Gallo Winery Co., Inc., 604 F.2d 645 (9th Cir. 1979), consumers and farmworkers sued a wine manufacturer and others based on an alleged conspiracy in restraint of trade to cut back on grape production in order to raise prices. The court held that the farmworkers did not have Clayton §4 standing because their injury was too remote to give rise to a claim for relief under the antitrust laws. The court noted that the farmworkers may not use the antitrust laws "as a vehicle to achieve goals unrelated to the purposes for which the antitrust laws were passed. Gutierrez v. E & J Gallo Winery Co., Inc., supra, 604 F.2d at 646. In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, supra, involved a claim by farmers, among others, that automobile manufacturers had conspired to eliminate all competition in the research and development of automobile air pollution control equipment. The alleged injury to the farmers was that increased air pollution damaged their crop production. The court held that the farmers lacked Clayton §4 standing because no interest of theirs fell within the area of the economy, that is the market for retail sales of cars, affected by the alleged breakdown of competitive conditions. In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, supra, 481 F. 2d at 129-30.

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27 28 In the instant case, even if it be assumed, arguendo, that Rodak has a monopoly position in a relevant market, the antitrust vice of such a monopoly would be its purpose or effect to eliminate competition and thus to increase the prices charged by Kodak in that market. If plaintiffs were suing Rodak in this

action for damages allegedly caused by such higher prices, they would allege a claim for relief. But plaintiffs make no such claim; instead, they evidence a willingness to pay Kodak's price and complain only of having been denied processing of sexually explicit film by Kodak with resultant damage. In so doing, plaintiffs fail to bring themselves within the target area of the economy endangered by Kodak's alleged monopoly.

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If plaintiffs' allegations are taken as true, then Kodak's refusal to return to plaintiffs various sexually explicit pictures, rather than contributing to the breakdown of economic conditions within the target area, i.e., relevant market, acutally generates added business for Kodak's competitors and thereby promotes competition. The Allinger Affidavit demonstrates that there are many non-Kodak film processing laboratories readily available to plaintiffs in California which are capable of achieving the same quality of film reproduction as Kodak's processing laboratories. Plaintiffs' being required to use these non-Kodak processing laboratories would tend to enhance ratner than diminish competition in the California film processing market. In fact, if Kodak was really attempting to achieve or maintain monopoly power in the market, it would take steps in furtherance of that goal to eagerly seek the business of these plaintiffs.

Moreover, applying the <u>Contreras</u> test, plaintiffs' make no allegation or showing as to how <u>Kodak's limited refusal</u> to deal with plaintiffs is intended to further any alleged

market concentration or dominance allegedly desired by Kodak; nor is the alleged injury to plaintiffs one which <u>must</u> occur for modak to achieve dominance in the relevant photofinishing market. To the extent that plaintiffs have suffered any injury by reason of Kodak's challenged policy and practice, such alleged injury is <u>incidental</u> to the purposes for which Kodak's alleged monopoly position was created and maintained. Therefore, plaintiffs do not satisfy the Ninth Circuit's "target area" causation test for Clayton \$4 standing and may not now seek treble damages and attorney's fees by reason of any alleged antitrust violation.

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 C. Even if Kodak Did Have a Monopoly Position in a Relevant Market That Violated Section 2 of the Sherman Act, Plaintiffs Have Suffered No Irreparable Injury By Reason of Kodak's Policy of Refusing to Process Certain Types of Sexually Explicit Film.

Section 16 of the Clayton Act (15 U.S.C. §26) provides, in relevant part, for injunctive relief to remedy an antitrust violation as follows:

Any person, firm, corporation, or association shall be entitled to sue for and nave injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage

by a violation of the antitrust law . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damages granted by courts of equity, under the rules governing such proceedings, . . .

Section 16 standing requires that the plaintiff allege and prove a threatened loss or damage, as the result of antitrust violations, of the kind normally cognizable in equity. In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, supra, 481 P.2d at 130-31. In short, plaintiffs must establish that they are suffering a type of irreparable injury not compensable by money damages.

In an attempt to satisfy this Section 16 requirement, plaintiffs allege that they will suffer irreparable injury unless Kodak is enjoined from further refusals to return sexually explicit film to plaintiffs or from further attempts to create or maintain its monopoly. [Complaint, p. 4, ls. 11-14.] Such "irreparable injury" is alleged as follows:

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A. It would be extremely difficult, if not impossible, to measure the damages suffered by Plaintiffs as a result of Defendant's refusal to return certain films.

B. The quality of Plaintiffs' magazines

will be subtantially lowered. There is no

way in which the injury resulting from this decrease in quality can be measured.

C. Plaintiffs' ability to exercise their rights of free speech and press wil be irreparably harmed. [Complaint, p. 4, ls. 16-26.]

These conclusory allegations of "irreparable injury" are based solely on plaintiffs' alleged need for Kodak film processing services, to the exclusion of other readily available film processing services, in order to be able to publish their magazines. This contention is simply untrue; there are many film processing laboratories other than Kodak's readily available to plaintiffs which are capable of achieving a quality of film reproduction fully adequate to meet plaintiffs' requirements. [Allinger Affidavit, pp. 7-8.]

Moreover, as to plaintiffs' allegations, denominated "A" and "B", of immeasurable damages, Kodak submits that the injuries alleged, if proved, would be remediable by money damages. To prove such damages plaintiffs would need only to show the nature and extent of their income reduction, e.g., by proof of reduced circulation of their magazines, and that such reduction was proximately caused by Kodak's refusal to return sexually explicit pictures allegedly belonging to plaintiffs. As to plaintiffs' claim of irreparable injury in their exercise of free speech and press rights, plaintiffs nowhere allege that Kodak's challenged policy and practice has prevented plaintiffs

from publishing or marketing their magazines.* If it were true that plaintiffs' free speech, in the form of selling their magazines, had been adversely affected by Rodak's refusal to return certain sexually explicit pictures, this is wholly the fault of plaintiffs in choosing to ignore noticed provisions of Rodak's practice as to the return of sexually explicit pictures. Moreover, the federal antitrust laws are not designed to protect freedom of speech but only untrammelled competition.

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D. Kodak's Policy of Not Returning Certain Types of Sexually Explicit Film to Customers Does Not Constitute an Attempt to Monopolize Within the Meaning of Section 2 of the Sherman Act.

In addition to their Sherman §2 monopolization claim for relief, plaintiffs allege that Kodak has "attempted to monopolize interstate trade and commerce in film developing." [Complaint, p. 2, ls. 10-11.] However, as in their monopolization claim, plaintiffs have alleged no facts entitling them to relief.

^{*} In fact, the implementation of Kodak's challenged policy nas not resulted in the censoring or suppression of plaintiff's sexually explicit magazines. Attached to this memorandum are copies of current editions of each of the plaintiffs' magazines.

[Defendant did not file any affidavit by which to place the magazines in evidence. Additionally, reproduction of the magazines would be extremely difficult. By reason thereof said magazines are not made a part of these excerpts.]

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An attempt to monopolize within Sherman \$2 occurs when there is (1) a specific intent on the part of the would-be monopolist to control prices or destroy competition in a market, (2) predatory conduct directed to accomplishing the unlawful purpose and (3) a dangerous probability of success. Janich

Bros., Inc. v. American Distilling Co., 570 F.2d 848, 853 (9th Cir. 1977), cert. denied, ____ U.S. ___, 99 S.Ct. 103 (1978).

As in the monopolization claim, plaintiffs bear the burden of proving each element of their attempt to monopolize claim. Id., 570 F.2d at 858.

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In the instant case, Rodak's policy and practice of refusing to return to customers certain sexually explicit pictures does not constitute a wielding of "monopoly power" to control prices or exclude competition in the photofinishing and developing market. Neither do Kodak's policy and practice evidence a specific intent to control prices or exclude competition in the market sufficient to constitute an attempt to monopolize offense if a dangerous probability of monopoly otherwise exists. Plaintiffs nowhere allege that Kodak maintains its challenged policy and practice as a result of such intent and, indeed, the effect of Kodak's policy is quite the contrary: to send plaintiff's business to Kodak's competitors. The only objective of this policy and practice is to protect Kodak and its employees from the risk of criminal prosecution for violating state and federal obscenity or other laws. To that end, Kodak offers to deal with plaintiffs and others wishing to take advantage of its film processing services on the contractual condition that Kodak may refuse to return certain types of sexually explicit pictures discovered during the processing of the customer's order. If plaintiffs find these conditions unacceptable, they are free to take their business to any of the other readily available non-Kodak film processing laboratories or to institute their own in-house film processing capability.

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E. Aodak's Limited Refusal to Deal with These
Plaintiffs Does Not Violate The Sherman Act.

Even if it were the case that Kodak is a monopolist, it does not follow that Kodak is compelled by force of the antitrust laws to develop and return sexually explicit pictures sent to it by plaintiffs. In <u>United States v. Colqate & Co.</u>, 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992 (1919), a soap and toilet article manufacturer engaged in resale price maintenance and refused to deal with all retailers who did not adhere to the fixed prices. The Supreme Court agreed with the lower court that this policy constituted no offense under the Sherman Act:

The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce - in a word to preserve

absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal; and, of course, he may announce in advance the circumstances under which he will refuse to sell. United States v.

Colgate & Co., supra, 250 U.S. at 307, 39

S.Ct. at 468 (citation omitted; emphasis added).

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The Colgate doctrine has been simply stated as follows: A unilateral refusal to deal, without more, and in the absence of any purpose to create or maintain a monopoly, is not unlawful under the Sherman Act. This doctrine has been expressly adopted by the Ninth Circuit Court of Appeals. Marquis v. Chrysler

Corp., 577 F.2d 624, 640 (9th Cir. 1977); Moore v. Jas. H.

Mathews & Co., 550 F.2d 1207, 1220 (9th Cir. 1971). Only a refusal to deal which is anticompetitive in purpose or effect, or both, constitutes an unreasonable restraint of trade in violation of the Sherman Act. Fount-Whip, Inc. v. Reddi-Whip, Inc., 568 F.2d 1296, 1300 (9th Cir. 1978); See Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), cert. denied, 396 U.S. 1062, 90 S.Ct. 752, 24

L.Ed.2d 755 (1970), reh. denied, 397 U.S. 1003, 90 S.Ct. 1113

(1979) (liquor distiller's termination of wholesale liquor distributor for legitimate business purposes and not for some anticompetitive or monopolistic objective is not actionable under the Snerman Act).

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Valid reasons for refusing to deal which do not involve an anticompetitive purpose or effect must surely include a good faith belief that there is a possibility that such dealing could result in being charged with having violated federal or state criminal obscenity statutes as well as a desire not to be involved with certain objectionable material. Illustrative of this latter reason is America's Best Cinema Corp. v. Ft. Wayne Newspapers, Inc., 347 F.Supp 328 (N.D. Ind. 1972). In America's Best Cinema Corp., plaintiffs were X-rated adult cinemas who sued corporate newspapers and their editors and publishers contending that the defendants' allegedly concerted advertising policy, refusing to display certain of the plaintiffs' advertisements, violated the antitrust laws and deprived plaintiffs of their constitutional rights. The defendants' challenged policy was to reject certain proposed newspaper ads from theaters showing X-rated films and to permit those theaters to run ads using their names and phone numbers only. The court held that this policy did not constitute an actionable violation of the antitrust laws. The court noted that the defendants had not refused to deal with the plaintiffs but had only instituted an advertising policy restricting the content of plaintiffs' ads. The court determined that the critical inquiry 11

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was whether or not the challenged practice was so anticompetitive in purpose or effect, or both, as to be an unreasonable restraint of trade. America's Best Cinema Corp. v. Pt. Wayne Newspapers, Inc., supra, 347 P.Supp at 333. The court found that there was no evidence that the defendants had any anticompetitive purpose in adopting their advertising policy. Rather, the defendants were concerned that they would lose their "family image" and be faced with the growing burden of policing 9 advertisements in order to locate and screen objectionable material. The court noted that "those purposes are clearly not anticompetitive". Id. The court noted as significant the fact that defendants did not cease dealing with plaintiffs altogetner, but only restricted the contents of their ads. The court also noted that a single newspaper entity could adopt the defendants' challenged advertising policy and be free from antitrust liability. Id., 347 P.Supp at 334. Compare, Associates & Aldrica Company, Inc. v. Times Mirror Company, 440 F.2d 133 (9th Cir. 1971), wherein the court held that a newspaper which had allegedly attained a monopoly position in Southern California could not be compelled to publish offensive advertisements without editorial control of their content merely 221 because such advertisements were not legally obscene; see also, Adult Film Association of America, Inc. v. The Times Mirror Company, 97 Cal.App.3d 77, 158 Cal.Rptr. 547 (2d Dist. 1979), hrg. denied, wherein it was held that the unilateral decision of the publisher of the Los Angeles Times to refuse to print future advertisements for sexually explicit motion pictures was not actionable under various asserted tort theories; Alpha-Sentura

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Business Services v. Interbank Card Association, 1979-2 Trade Case ¶ 62,960 (D.C.M.D. 1979), wherein the court held that an alleged conspiracy between a bank's credit card association and a Maryland bank to terminate bank card services theretofore provided to companies engaged in the adult entertainment business did not constitute a Sherman Act violation because there was no anticompetitive effect, the court noting that all adult entertainment businesses were the target of the alleged conspiracy and that, therefore, plaintiffs and their competitors were all subject to the same restrictions re the use of bank cards.

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In the instant case, there is similarly no anticompetitive purpose or effect involved in Kodak's policy and practice of refusing to return certain sexually explicit pictures. is not motivated by a desire to control prices or exclude competition in the photofinishing market; rather, its only interest is to avoid subjecting itself and its employees to the risk of criminal prosecution under federal and state obscenity statutes. Moreover, no anticompetitive effect results from Kodak's maintenance of its challenged practice. Indeed, the contrary is true: Kodak's maintenance of its challenged practice creates additional available business for Kodak's competitors in the photofinishing market. Moreover, Rodak's challenged practice applies uniformly to sexually explicit pictures sent to Rodak by plaintiffs or anyone else interested in developing certain sexually explicit material. Therefore, as in America's Best Cinema Corp., Adult Film Association of America, and

Alpha-Sentura, plaintiffs and their competitors all operate under the same conditions as to the return of certain sexually explicit material when they choose to do business with Kodak. Consequently, no Sherman \$2 violation is shown by plaintiffs.

3. Because Plaintiffs Neither Allege Nor Can
Prove Governmental Involvement in Kodak's
Policy and Practice of Refusing to Return
Certain Sexually Explicit Pictures, Plaintiffs' Claims of Alleged Deprivation of Their
Constitutional and Civil Rights Are Not
Cognizable in This Court.

Plaintiffs' second, third and fourth "causes of action" purport to "arise under" federal law - the second cause of action under 42 U.S.C. \$1983 and their third and fourth causes of action under the First and Fourteenth Amendments to the United States Constitution. These allegations are plainly untrue. Kodak's policy and practice of refusing to return certain sexually explicit pictures are its own, neither authorized nor required by any government official or agency.

Accordingly, plaintiffs' claims do not involve the element of state or governmental action necessary to constitute claims within the jurisdiction of this Court to adjudicate in the exercise of federal subject matter jurisdiction.

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Section 1983 of Title 42 of the United States Code provides a private remedy under federal law only against deprivations of civil rights "under color of" state law. Similarly, the First and Fourteenth Amendments to the United States Constitution speak, respectively, only of Congressional abridgements of the freedom of speech and of state denials of the equal protection of the laws. To plead and prove claims thereunder cognizable in a federal court, plaintiffs must demonstrate significant governmental action and involvement in the challenged actions of Kodak.

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It is well established that the "state action" requirement of the Fourteenth Amendment is equivalent to the "under color of state law" requirement of 42 U.S.C. §1983.

United States v. Price, 383 U.S. 787, 794 fn. 7, 86 S.Ct. 1152, 1157, 16 L.Ed.2d 267 (1966); Briley v. State of California, 564

F.2d 849, 855 (9th Cir. 1977). It is similarly well established that the prohibitions of the Fourteenth Amendment apply only to state action and not to conduct in the private sector. Burton v. Wilmington Parking Authority, 365 U.S. 715, 721-22, 81 S.Ct. 856, 860, 6 L.Ed.2d 45 (1961). Purely private activities which happen to impinge on speech are not prohibited in many circumstances where the First Amendment would forbid similar interference by the government. Bolodnak v. Avco Corp., Avco-Lycoming Division, 514 F.2d 285, 292 (2d Cir. 1975).

Plaintiffs attempt to establish the requisite governmental action by the following allegations:

(1) "that the unique superiority of Defendant's product is the result of Defendant's ownership of numerous patents granted by the United States and trademarks registered by the United States in various States."

[Complaint, p. 6, ls. 3-6]; and

(2) that certain federal and state obscenity statutes have "delegated to Kodak the responsibility of censoring the speech of Plaintiffs and all other customers . . . who wish to use Defendant's unique processing ability." [Complaint, p. 6, 1s. 20-24; p. 8, 1s. 8-12.]

Neitner of these allegations demonstrate the requisite governmental involvement in Kodak's challenged practice.

The Supreme Court has stated the following test for determining whether or not sufficient governmental involvement to constitute "state action" exists in the actions of a private regulated business:

. . . the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself. Jackson v. Metropolitan Edison

Company, 419 U.S. 345, 351, 95 S.Ct. 449, 453, 42 L.Ed.2d 477 (1974) (citations omitted).

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A. The Grant of Exclusive Patent and Trademark
Rights Does Not Make the Conduct of the Grantee
State Action.

Plaintiffs' allegation that the federal government has granted exclusive patent rights to Rodak is irrelevant insofar as plaintiffs' 42 U.S.C. \$1983 claims are concerned. Pederal government involvement, as opposed to state governmental involvement, is irrelevant to the 'under color of state law' requirement of \$1983. Askew v. Bloemker, 548 F.2d 673, 677 (7th Cir. 1976); Blackburn v. Pisk University, 443 F.2d 121, 123 (6th Cir. 1971); Browns v. Mitchell, 409 F.2d 593, 595 (10th Cir. 1969). However, inasmuch as plaintiffs assert substantially identical claims for relief under both 42 U.S.C. \$1983 and the First and Fourteenth Constitutional Amendments, it must be determined whether or not the grant of patent and trademark rights under federal or state law constitutes the requisite governmental action. The answer is clearly in the negative in the light of precedents in analogous situations.

It is clear that the mere grant of a corporate charter is a ministerial government act which does not involve the state to such degree in the activities of the chartered corporation as to make the latter's pusiness policies and practices "state"

action". Greenya v. George Washington University, 512 P.2d 556, 560 (D.C. Cir. 1975), cert. denied, 423 U.S. 995, 96 S.Ct. 422, 46 L.Ed.2d 369. Similarly, the mere grant by the state of a liquor license to a private club does not sufficiently implicate the state in the racially discriminatory guest policies of that club so as to satisfy the "state action" requirement of the Equal Protection Clause of the Fourteenth Amendment. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 177, 92 S.Ct. 1965, 1973, 32 L.Ed.2d 627 (1972).

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Other cases have also held that actions of private entities conducting business pursuant to state licenses and permits did not constitute the requisite state action. Fulton v. Hecht, 545 F.2d 540 (5th Cir. 1977), cert. denied, 430 U.S. 984, 97 S.Ct. 1682, 52 L.Ed.2d 379 (1977), reh. denied, 431 U.S. 975, 97 S.Ct. 2941, 53 L.Ed.2d 1073 (state licensing and requlation of greyhound racetrack does not constitute state action); Gemini Enterprises, Inc. v. WFMY Television Corp., 470 F.Supp. 559 (N.D.N.C. 1979) (action by state-licensed broadcaster denying astrological forecasting service media access did not constitute state action within \$1983); Guthrie v. Alabama By-Products Co., 328 F.Supp. 1140 (N.D. Ala. 1971) (discharge of industrial waste pursuant to state-issued permit did not constitute state action within \$1983); cf. Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 93 S.Ct. 2080, 36 L.Ed.2d 772 (1973) (plurality opinion).

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Plaintiffs contend that Kodak's alleged monopoly power is due, at least in part, to Kodak's ownership of patents and trademarks granted by federal and state governments. [Complaint, p. 6, ls. 1-6.] Bowever, these conclusionary allegations contribute nothing towards satisfying the governmental action requirement. The Supreme Court has held that the claim that a state allegedly conferred monopoly status upon a defendant is not determinative in considering whether or not that defendant's termination of electrical service to the petitioner was 'state action' within the Fourteenth Amendment. Jackson v. Metropolitan Edison Company, supra, 419 U.S. at 251-52, 95 S.Ct. at 454; accord, Taylor v. St. Vincent's Hospital, 523 F.2d 75, 77-78 (9th Cir. 1975), cert. denied, 424 U.S. 948, 96 S.Ct. 1420, 47 L.Ed.2d 355 (1976).

In <u>Jones v. Eastern Maine Medical Center</u>, 448 F.Supp.

1156 (D. Maine 1978), the court held that the refusal of a private medical facility to perform elective non-therapeutic second trimester abortions, where said facility received funds from state and federal government and was subject to state regulation, did not constitute the requisite state action within §1983. The court's rationale was that the "close nexus" test was not satisfied because there was no connection between the state involvement and the facility's internal abortion policies.

Jones v. Eastern Maine Medical Center, supra, 448 F.Supp. at 1161.

No case has decided the precise question whether a grant of patent or trademark rights is sufficient, without more, to make the activities of the grantee "state action". However, the above-cited analogous cases dealing with actions under state charters, permits and licenses require a negative conclusion. Moreover, whereas those cases dealt with a state's authorization of private entities to engage in particular activities affecting third parties, the instant grant of exclusive patent and trademark rights to Kodak only purports to regulate the actions of third parties in dealing with protected property rights at Kodak. Therefore, there is really less governmental involvement in Kodak's exercise of its protected property rights than there is in the above-cited cases.

B. The California and Federal Governments Have Not Delegated Any Censorial Functions to Rodak.

Plaintiffs' allegation that the federal government and California have delegated to Kodak the power and function of a censor vis-a-vis obscene film and pictures is plainly specious. In giving effect to its policy and practice of refusing to return certain sexually explicit pictures, Kodak sits as neither court, trier of fact, nor censor. Kodak neither exercises nor purports to exercise governmental powers. As shown by the McClaskey Affidavit, Kodak's challenged policy and practice was not formulated (a) at the request of, in cooperation with or with the knowledge of law enforcement authorities or (b) with the intent or purpose of participating in the enforcement of the

obscenity laws or censoring or suppressing the publication or distribution of sexually explicit magazines. Kodak's only motivation for adopting its challenged policy and practice relating to the return of certain sexually explicit pictures is its belief that returning such pictures might subject Kodak and/or its employees to the risk of being charged with or criminally prosecuted for violating constitutionally valid state and federal obscenity laws. [McClaskey Affidavit, pp. 5-6.] To that end, Kodak has adopted a policy and practice designed to withhold only pictures defined as obscene by the United States Supreme Court in Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). [McClaskey Affidavit, pp. 2-5.]

Plaintiffs apparently would have this Court hold that Kodak's taking of limited steps designed to avoid possible prosecution under constitutionally valid federal and state obscenity laws makes Kodak's policy and practice "governmental action" for the purpose of giving plaintiffs access to this Court to seek redress for harm allegedly caused plaintiffs, which they couch in terms of an alleged violation of civil rights and constitutional claims. The contention is specious: much more is clearly necessary to obtain access to a federal court to litigate the kind of claims asserted by plaintiffs.

Plaintiffs apparently rely on Marsh v. State of

Alabama, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946),

wherein the court held that the Pourteenth Amendment is applicable to nominally private activities abridging free speech

where the government has delegated to private groups the power to perform traditionally public functions. There the court held that the state could not impose criminal punishment on a member of the Jehovah's Witnesses who undertook to distribute religious literature on the premises of a company-owned town contrary to the wishes of the town's management. Of course, the situation of the company town in Marsh is totally different and distinguishable from that of Kodak in the case at bar. Kodak's position would be analogous to the company town only if it appeared that Kodak was an officially sanctioned censor and it actually suppressed plaintiffs' magazines or barred them from distribution based on its subjective evaluation of their content. Unlike the company town in Marsh, however, Kodak does not possess the indicias of a government sanctioned censor nor does its challenged practice result in censorship of plaintiffs' magazines. Rodak's practice, unlike the enforcement of the town ordinance in Marsh, does not bar plaintiffs from publishing and distributing their magazines when and where they choose and with wnatever content they choose.

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In Melara v. Kennedy, 541 F.2d 802, 805 (9th Cir. 1976), the Ninth Circuit Court of Appeals noted decisions of other courts holding that state action may be found where there has been a delegation of traditional state functions to private parties through the enactment of state statutes. The court went on to note that the "delegation of state function" rationale had never been accepted in the Ninth Circuit, but did briefly consider this rationale before deeming it inapplicable to the

facts of that case, which involved the proposed extra-judicial sale of stored goods to enforce a warehousman's lien. Melara v. Kennedy, supra, 541 F.2d at 807-08.

In <u>Flagg Bros.</u>, Inc. v. Brooks, 436 U.S. 149, 98 S.Ct. 1729, 1735-37, 56 L.Ed.2d 185 (1978), a case involving similar facts as <u>Melara</u>, the court cited <u>Marsh v. State of Alabama</u> and its progeny re the potential expansion of the public function doctrine before concluding as follows:

Thus, even if we were inclined to extend the sovereign function doctrine outside of its present carefully confined bounds, the field of private commercial transactions would be a particularly inappropriate area into which to expand it. (Emphasis added.)

Similarly, even assuming, <u>arquendo</u>, that the regulation of obscene materials is a traditional state function and that Kodak's actions constitute performance of that function, to some degree, the requisite governmental action cannot be injected into what is essentially private commercial transactions by application of the sovereign public function doctrine.

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This Case, Insofar as Plaintiff's Claims
 For Declaratory Relief are Concerned,
 Lacks the Concrete Adverseness Necessary
 to Create a Justiciable Controversy.

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Plaintiffs' purported "fourth cause of action" seeks a declaratory judgment that certain federal and state obscenity statutes are unconstitutional to the extent that they may be interpreted as prohibiting a film processing company from returning sexually explicit pictures in those instances where development of the pictures "is merely an interim step in a publishing process of a magazine". [Complaint, p. 10, 1s. 3-4.] Plaintiffs seek a declaration that the federal and state obscenity statutes are unconstitutional both facially and as applied to plaintiffs because and to the extent that, as plaintiffs contend, they operate as a prior restraint creating an impermissible chilling effect upon plaintiffs' speech. [Complaint, p. 10, ls. 1-11.] However, this Court does not have jurisdiction in this action to determine whether plaintiffs are entitled to the declaratory relief they seek because this case lacks the concrete adverseness necessary to create a justiciable controversy within the meaning of Article III, Section 2 of the United States Constitution and the Federal Declaratory Judgment Act.

It is true that Article III, Section 2, Clause 1 of the United States Constitution and the Pederal Declaratory

Judgment Act (28 U.S.C. 52201) extend the federal judicial power

to cases of actual controversy wherein declaratory relief is sought. But in such cases there must be an actual and substantial controversy, between parties, having truly adverse legal interests, in which the constitutionality of the statute is drawn into question between parties each of whom has a strong interest and motive to assert and win his position. Golden v. Zwickler, 394 U.S. 103, 108, 89 S.Ct. 956, 959-60, 22 L.Ed.2d 113 (1969). In this case, Kodak has no such interest or motive to defend the constitutionality of the federal and state statutes attacked by plaintiffs.

The standard for finding a justiciable controversy is no less demanding in a declaratory judgment action than in any other type of action. Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 461, 65 S.Ct. 1384, 1389, 89 L.Ed. 1725 (1945).

Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, state or federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of powers is the ultimate and

supreme function of courts. It is legitimate only in the last resort, and is a necessity in the determination of real, earnest, and vital controversy between individuals. Chicago & G.T. Railway Co. v. Wellman, 143 U.S. 339, 345, 12 S.Ct. 400, 402, 36 L.Ed. 176 (1892).

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In the instant case, Kodak does not have a personal stake in the outcome of plaintiffs' declaratory relief claims sufficient to "assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.* Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962). Rodak neither exercises nor purports to exercise governmental powers and has no interest in defending the constitutionality of the various challenged obscenity statutes or obtaining a particular interpretation thereof. Kodak is only interested in obeying the laws as they exist and as Kodak believes they may be interpreted and enforced by governmental authorities. Kodak does not intend to defend the constitutionality of the various obscenity statutes as applicable to plaintiffs' publishing process and cannot be compelled to do so. Therefore, plaintiffs' claims for declaratory relief do not present the exigent adversity which is a condition precedent to federal court jurisdiction to adjudicate constitutional issues.

-67- -93-

In Granfield v. Catholic University of America, 530 F.2d 1035 (D.C. Cir. 1976), cert. denied, 429 U.S. 821, 97 S.Ct. 68, 50 L.Ed.2d 81, two catholic priests who were employed by a university as law professors brought consolidated civil actions alleging that they were entitled to parity of salaries with lay faculty members. Among the First Amendment Establishment Clause arguments fashioned by the plaintiffs was an assertion that the university's receipt of government grants violated the Establishment Clause so long as the discriminatory wage scale continued. The court held that there was a lack of required adversariness as to this assertion to present a case or controversy subject to federal adjudication. The court noted that no official of the United States government responsible for the administration of grants to the defendant university had been made a party to the litigation. Granfield v. Catholic University of America, supra, 530 F.2d at 1044. The court found it "extremely meaningful" that plaintiffs and the defendant university did not have adverse views as to the propriety of the government grants per se. The university obviously welcomed the aid and the plaintiffs only disapproved of the defendant's receipt of aid on the narrow grounds presented. Therefore, there was such a want of concrete adverseness as to this issue "that sound principles of judicial restraint warrant no further consideration of this important constitutional issue." Granfield v. Catholic University of America, supra, 530 F.2d at 1045 (fn. omitted); cf. Moore v. Charlotte-Hecklenburg Board of Education, 402 U.S. 47, 47-48, 91 S.Ct. 1292, 1293, 28 L.Ed.2d 590 (1971) ("We are thus confronted with the anomaly that both

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litigants desire precisely the same result, namely a holding that the anti-busing statute is constitutional. There is, therefore, no case or controversy within the meaning of Art. III of the Constitution.* (Citation omitted.))

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In Mendez v. Heller, 530 F.2d 457 (2d Cir. 1976), a wife brought a civil rights action under 42 U.S.C. \$1983 against the presiding judge of the New York Supreme Court, the Court clerk and the New York Attorney General seeking to invalidate the New York two-year durational residency requirement for divorce actions. The federal district court held that none of the named defendants had a legal interest sufficiently adverse to plaintiff's to create a justiciable controversy. This conclusion rested upon the finding that if divorce proceedings were commenced, Heller, a Justice of the New York Supreme Court, would be called upon to determine the validity of the New York statute and, in so doing, would be acting in an impartial judicial capacity. The court of appeals agreed and held that in its present form the case did not present the "exigent adversity" which is an essential condition precedent to federal court adjudication. Mendez v. Heller, supra, 530 F.2d at 461.

In the instant case, no representatives of the California and federal governments are before the court to assert the constitutional validity of the challenged state and federal obscenity statutes. Kodak has not motivation to defend the constitutionality of the challenged statutes. Therefore, this case does not present the "exigent adversity" re plaintiffs'

claims for declaratory relief and the present posture of the case is inappropriate for a judicial determination of these claims.

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Should Kodak Prevail On This Motion,
 Kodak is Entitled to Its Reasonable
 Attorney's Fees Incurred in Defending
 This Action.

A court has the inherent power to award attorney's fees to the successful litigant in any case where the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 258-59, 95 S.Ct. 1612, 1622, 44 L.Ed.2d 141 (1975); Tenant and Owners in Opposition to Redevelopment v. U.S. Dept. of Housing and Urban Development, 406 F.Supp. 960, 964 (N.D. Cal. 1975). Bad faith may be found from the failure of a plaintiff to voluntarily withdraw his action when sufficient facts become available to demonstrate the frivolous bases of his claims. Nemeroff v. Abelson, 48 U.S.L.W. 2634 (2d Cir. Mar. 17, 1980).

Rodak submits that plaintiffs have acted in bad faith by commencing this baseless federal court action in addition to a parallel action in the Los Angeles County Superior Court.

Furthermore, if plaintiffs fail to voluntarily dismiss this action after receiving this brief demonstrating the weaknesses

of their federal claims, then such failure supports an assessment of reasonable attorney's fees against plaintiffs.

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The Civil Rights Attorney's Fees Award Act of 1976 amended 42 U.S.C. \$1988 to read, in relevant part, as follows:

In any action or proceeding to enforce a provision of Sections 1981, 1982, 1983, 1985 and 1986 of this title, . . ., the court, in its discretion, may allow the prevailing party, . . ., a reasonable attorney's fee as part of the costs.

Courts have held that \$1988, as amended, does not require a showing of bad faith as a prerequisite to an award of attorney's fees in favor of the prevailing party. Patzkowski v. United States, 576 F.2d 134, 137 (8th Cir. 1978); Goff v. Texas Instruments, Inc., 429 F.Supp. 973, 975 (N.D. Tex. 1977); c.f. Klotz v. United States, 602 F.2d 920, 924 (9th Cir. 1979).

In Goff v. Texas Instruments, Inc., supra, plaintiff filed an employment discrimination suit pursuant to 42 U.S.C. \$\$1981-1985 against the defendant corporation alleging that he was terminated because of his religion and national origin. The defendant filed a motion for judgment on the pleadings or, alternatively, summary judgment on the grounds that plaintiff had failed to allege the necessary elements for each of the civil rights laws invoked, including a lack of the state action

required under \$1983. At the hearing, plaintiff conceded that he did not state any claim pursuant to the federal jurisdiction invoked. The court applied the following "clearly frivolous" standard in assessing attorney's fees against the plaintiff:

when, however, a plaintiff proceeds on a clearly frivolous legal basis, such as suing a private corporation under \$1983 without any contentions of state action, he should be liable for reasonable attorney's fees.

Goff v. Texas Instruments, Inc., supra, 429

F.Supp. at 976 (fn. omitted).

In the instant action plaintiffs have similarly sued Kodax, a private corporation, under \$1983 and have sought their own attorney's fees under that statute without more than a clearly frivolous legal basis for alleging that Kodak has acted under color of state law. Therefore, pursuant to 42 U.S.C. \$1988, plaintiffs should be held liable for Kodak's reasonable attorney's fees incurred in defending, and ultimately prevailing in, this action.

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CONCLUSION

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For the reasons stated above, Kodak asks the Court to grant its motion for summary judgment against all plaintiffs and to award its reasonable attorney's fees in assessment of costs.

Respectfully submitted,

JOHN R. McDONOUGH
J. STEVEN GREENFELD
BALL, HUNT, HART, BROWN AND BAERWITZ

JOHN R. MCDEROUGH

Attorneys for Defendant Eastman Kodak Company

JOHN R. McDONOUGH 1 J. STEVEN GREENFELD BALL, HUNT, HART, BROWN AND BAERWITZ 2 450 North Roxbury Drive, Fifth Floor Beverly Hills, California 90210 3 (213) 278-1960 RECEIVED 4 JUN 9 1980 Attorneys for Defendant 5 Eastman Kodak Company HURL HITE 6 690*** A P. C. 7 UNITED STATES DISTRICT COURT 8 CENTRAL DISTRICT OF CALIFORNIA 9 10 HUSTLER MAGAZINE, INC., a 11 corporation, and CHIC MAGAZINE, INC., a corporation,) 12 NO. 80 00561 IH Plaintiffs. 13 AFFIDAVIT OF NORMAN D. MCCLASKEY 14 VS. EASTMAN KODAK COMPANY, a 15 corporation, 16 Defendants. 17 STATE OF NEW YORK) 18 SS: 19 COUNTY OF MONROE 20 21 I, NORMAN D. McCLASKEY, of full age, being duly sworn 22 according to law, upon my oath depose and say: 23 24 1. I am an attorney admitted to practice law in the 25 States of Iowa, Illinois and New York, and a member of the 26 Corporate Legal Department of Eastman Rodak Company ("Kodak" 27

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herein). In my latter capacity, I have the responsibility within

Rodak for rendering legal advice and performing legal and related

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- 2. In the middle of 1978, I was assigned the task of reviewing Kodak's then existing policy on returning to customers prints, negatives, transparencies and other items (hereinafter "pictures") produced during development and processing of exposed film sent to Kodak by such customers when it was discovered during the completion of a customer order that such pictures depicted sexually explicit subject matter. More particularly, I was assigned the task of determining whether and when returning such sexually explicit pictures might subject Kodak and/or its employees to a risk of being charged with or criminally prosecuted for violating state and federal obscenity laws.
- 3. The first phase of my review consisted of an analysis of decisions issued by the United States Supreme Court as a basis for determining what kinds of materials are "obscene" and thus subject to state and federal regulation. During this phase of the review, I determined that the controlling United States Supreme Court case on this subject is Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). In Miller and subsequent cases, the Court stated that patently offensive representations or descriptions of the following subject matter can be regulated by state and federal obscenity laws without violating the free speech guarantees of the United States Constitution:

(a) ultimate sexual acts, normal or perverted, actual or simulated;

- (b) masturbation, excretory functions, and lewd exhibition of the genitals. Miller v. California, supra, 413 U.S. at 25, 93 S.Ct. at 2615.
- 4. The second phase of my review concentrated upon whether film processing laboratories and/or their employees would run a risk of criminal prosecution under federal obscenity laws if they returned to customers pictures which depict the kind of subject matter denied constitutional protection under the Miller standard. My review of recent cases involving prosecutions under federal obscenity statutes indicated to me that these statutes had been held constitutional and construed by federal courts and the United States Supreme Court to proscribe the distribution of pictures which fall within the Miller definition of obscenity and thus are not entitled to constitutional protection.
- 5. I also reviewed the obscenity statutes and related cases in those states wherein Kodak has film processing laboratories. This review established that the obscenity statute in each of these states defined subject matter not entitled to constitutional protection in that each statute (a) expressly defined obscenity in a manner substantially the same as the Miller case, (b) had been judicially construed to reach the same subject matter that Miller held was not protected, or (c) was worded in such a way that it could be reasonably construed to reach subject matter not protected by the Miller guidelines.

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- I then analyzed recent state and federal obscenity cases to determine whether individuals and businesses selling or distributing materials depicting subject matter proscribed by laws that were valid under the Miller holding were being prosecuted and convicted. I found that they were. The same analysis indicateto me that courts construed obscenity statutes in such a way so as not to apply to pictures depicting simple nudity and that the statutes would be unconstitutional to the extent that they were so construed.
- 7. Based on the foregoing study and analysis, I conclude that Kodak could return pictures depicting simple nudity with relatively little risk of being charged with or criminally prosecuted for violating obscenity statutes. On the other hand, I concluded that returning pictures depicting subject matter which is obscene under the Miller guidelines presented a significant risk of Kodak and/or its employees being so charged or prosecuted. I therefore recommended to the senior management of Kodak that, as a matter of sound business judgment, the company adopt the policy of refusing to return the latter type of pictures to customers in order to obviate or at least reduce the risk that (a) Kodak or its employees or both would be charged or prosecuted for doing so and (b) the company or its employees would be injured as a result of such a charge or prosecution.
- 8. My recommendation was accepted. Kodak's policy on returning sexually explicit pictures was revised to avoid the violation of current state and federal obscenity laws which pass

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9. Rodak's policy of not returning certain types of sexually explicit pictures was formulated unilaterally and it is based on the business consideration of avoiding the injury and/or expense to the company or its employees that would result if Rodak and/or its employees were accused of violating the obscenity laws. This policy was not formulated (a) at the request of, in cooperation with or with the knowledge of law enforcement authorities or (b) with the intent or purpose of participating in the enforcement of the obscenity laws or censoring or suppressing the publication or distribution of sexually explicit magazines. Implementation of this policy has not resulted in the censoring or suppression of sexually explicit magazines since such magazines depictive sexually explicit subject matter are currently being published and sold to the public.

10. Rodak's only motivation for adopting its challenged policy and practice relating to the return of certain sexually explicit pictures is its belief that returning such

 pictures might subject Kodak and/or its employees to the risk of being charged with or criminally prosecuted for violating constitutionally valid state and federal obscenity laws.

NORMAN D. MCCLASKEY

Sworn to and subscribed before me, a Notary Public in and for the County of Monroe, in the State of New York, at the City of Rochester, in said County and State, this ### day of June, 1980.

NOTARY PUBLIC OF THE STATE OF NEW YORK

ROBERT D. CROOS
Nearly Public, State of New York
Qualified in Notice County, N.Y.
O. A. Commission Statement St. 192.



NOTICE

Because of Federal and State laws relating to pornography, Zastman Kodak does not wish to handle pictures that show sexually explicit conduct. Our Legal Department has informed us that processing pictures for customers depicting the following subject matter may subject Kodak to potential criminal prosecution:

- (a) Ultimate sexual acts, normal or perverted, actual or simulated.
- (b) Masturpation, excretory functions or lawd exhibition of genitals.

Film sent to Kodak for processing which depicts such subject matter will not be returned because of the potential legal problems mentioned above.

EASTMAN YCDAK COMPANY

ECHIBIT A

neral Terms (continued)

anty and Limitations of Liability

products are estd without wertarily or fability of any kind, ascapp with a states on, is packaged with, or accompanies such prodlid, with respect to the sale, use, processing and handling of semistrat goods are subject to the applicable Sintason of is isseed below:

is films will be replaced if detective in manufacture, labeling, or ring, or if damaged or less by us or any subsidiary company, for such replacement, the sale, processing, or other hending of ins is without warranty or lability, even though defect, damage, is caused by nepoperice or other fault. Since calor dyes may in singe, color films will not be replaced for, or otherwise warranted , any change in calor.

essing Service

in Policy.—The return of any film or print to us for processing or or purpose will constitute an agreement by you that if any such arms is damaged or less by us or any subsidiary company it will licitis with an equivalent amount of unexposed Kodala film and ang. Except for such replacement, the handling of such film or y us is without warranty or liability even though damage or loss and by neguçance or other fault.

any Ersificat Pictures Policy—There are state and federal statutes on the title distribution of pictures decicting certain types of resplicit conduct. When Kodas disponers pictures in a cusponer of the conduct which the pictures in the pictures in the decicting such conduct, if cannot return those pictures to the dispossibility. Kodas will not return such pictures to the customer status of a nooce will be sent to the customer statung that the have been withhead and requesting permission to destroy the

In accordance with federal and state laws, pictures depicting following types of conduct with not be returned to tempera by Kotak when they are discovered danning the completion experience order.

- Actual or simulated acts of sexual intercourse, hoteroseasy homosexual, normal or pervented.
- 2. Magrurbason, excretory functions or level exhibition of gen
- 3. Semiality, flagellation, or other types of sexually a

Essement Kodak Company also reserves the right to refuse to reduce pictures depicting satust or aberrant conduct which are out the categories of conduct described in applicable lews, Kodak will its discretion in determining whether to compare the customer prosuch situations. When Kodak chooses not to reproduce pictures of types, they will be returned to the customer price doing so should audient the company to possible criminal prosecution. A national accompany the returned pictures giving the reason they were reproduced. JOHN R. McDONOUGH
J. STEVEN GREENFELD
BALL, HUNT, HART, BROWN AND BAERWITZ
450 North Roxbury Drive, Fifth Floor
Beverly Hills, California 90210
4 (213) 278-1960

Attorneys for Defendant Eastman Rodak Company

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HUSTLER MAGAZINE, INC., a ()
COTOGRATION, and CHIC ()
MAGAZINE, INC., a COrporation, ()

Plaintiffs.

. VS.

EASTMAN KODAK COMPANY, a corporation,

Defendant.

CIVIL ACTION NO. 80 00561 IH
DECLARATION OF FLOYD FISCHER

- I, FLOYD FISCHER, do hereby declare as follows:
- I have been continuously employed by Eastman Kodak
 Company ("Kodak" herein) from March, 1949 to the present at Kodak's
 Hollywood, California film processing laboratory.
- 2. From 1949 to approximately 1975, I performed various film processing operations at Kodak's Hollywood film processing laboratory, including feeding film onto the processing machine and taking film off the machine, operating the film processing machine and supervising the entire processing operation for various films.
- In approximately 1975, I was assigned to Kodak's Customer Service Department as a commercial film processing

representative. As such, I contacted customers and represented the 1 Hollywood laboratory's processing services to the makers of commercial motion picture films. I continued in this assignment until the latter part of 1978.

- 4. Commencing in the latter part of 1978 and continuing to the present, I have been amploved by Kodak's Hollywood film processing laboratory as a customer service specialist. As such, I contact customers and represent the services of the Hollywood processing laboratory by telephone, personal meetings and written letters. I am responsible for dealing with customers' reactions, complaints and needs regarding various services offered by Kodak's Hollywood processing laboratory.
- 5. On December 8, 1978, Robert DeMarco, who represented himself as the Photo Director of Hustler Magazine, came into my office at the Hollywood processing laboratory. Also present was Jim Lawson, a processing representative of Kodak's Hollywood processing laboratory. At that time, I explained Kodak's policy as to the processing and return of sexually explicit pictures to Mr. DeMarco. I handed Mr. DeMarco a copy of the notice of Kodak's policy as to the return of certain sexually explicit pictures which is attached hereto as Exhibit A. I observed Mr. DeMarco read such notice in my presence. Mr. DeMarco then told me that he would inform Larry Flynt as to Kodak's policy and the notice I had given him. This meeting with Mr. DeMarco lasted approximately ten (10) minutes.

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28 111 I declare under penalty of perjury that the foregoing is true and correct and that this Declaration was executed on May 30 1980, at Hollywood, California.

Floyer Fischer
PLOYD FISCHER



NOTICE

Because of Federal and State laws relating to pornography, Eastman Kodak does not wish to handle pictures that show sexually explicit conduct. Our Legal Department has informed us that processing pictures for customers depicting the following subject matter may subject Kodak to potential criminal prosecution:

- (a) Ultimate sexual acts, normal or perverted, actual or simulated.
- (b) Masturbation, excretory functions or lewd exhibition of genitals.

Film sent to Kodak for processing which depicts such subject matter will not be returned because of the potential legal problems mentioned above.

EASTMAN KODAK COMPANY ... 1017 NORTH LAS PALMAS AVENUE - LOS ANGELES, CALIFORNIA 90038 - 213 465-7151 [THIS PAGE INTENTIONALLY LEFT BLANK]

- (a) Operating photographic film processes used to develop Kodak color films that were evaluated by members of the Kodak Film Testing Division to determine the quality of the films and the processes used to develop them. (1953-55, 1957-61.)
- (b) Photographing human models and other subject matter with various color films that were used by members of the film testing division to evaluate film quality, including Extachrome and Rodachrome films and their respective developing processes. (1961-1965.)
- (c) Holding positions of increasing responsibility in the area of evaluating the performance of films and the quality of pictures they produce, including the Ektachrome and Kodachrome films.
- (d) Teaching and lecturing on photography and acting as a judge in Kodak sponsored photographic competitions at various times during this period and in later years.

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- (e) Providing technical advice and assistance to non-Kodak Ektrachrome film processing laboratories relating to the proper operation of the process for developing E-3 Ektachrome films. (1972-74.)
- (f) Assisting in the pre-introduction trade trials and the introduction of new E-6 Ektachrome professional films and the new process for developing these films, including providing technical assistance to non-Kodak Ektachrome film processing laboratories that switched from the old Ektachrome developing process to the new developing process for the new E-6 Ektachrome professional films. (1974-76.)
- (g) Increasing responsibility as a Product Specialist for providing technical liaison and advice to non-Kodak Ektachrome film processing laboratories on the proper operation of the developing process for this film and later the additional responsibility for providing the same type of assistance to non-kodak Kodachrome film processing laboratories. (1976 to present.)
- 2. In addition to my current duties described in paragraph 1, I am also currently responsible for assisting in the coordination of work performed by Kodak specialists in

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3. Kodachrome film was first marketed by Kodak in the 1930s. When this film is exposed and developed, it produces color transparencies (as distinguished from "negatives") that depict the photographed subject matter. The photosensitive emulsion (coating) put on the film during manufacture contains none of the color dyes ultimately used to create color images that appear on the film after development. During the initial stage of development of exposed Kodachrome film, the first images that appear are formed in the manner similar to image formation in negative black-and-white film. That is the images are formed as metallic silver in the photosensitive emulsion on the film. In succeeding stages of development, the Kodachrome film, which has no color dyes in its photosensitive emulsion, goes through various processing steps and solutions containing different color forming dye agents that react with oxidized developer to impart color to the black-and-white images on the film. Because the color forming dye agents used to impart color to developed Kodachrome film are contained in the chemical solutions used to develop the film, rather than in the photosensitive emlusion on the film, the development process is complex, encompassing 16 separate and controlled procedures. Although there have been changes and

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- 4. Kodak currently markets no version of Kodachrome film designed specifically with the needs of professional photographers in mind. Kodachrome film is marketed for use by the public at large; professional photographers who choose to use Kodachrome film must use the same type of film that is sold for use by amateur photographers. More Kodachrome film is used by amateur photographers than by professional photographers doing commercial photography. The film is capable of providing color transparencies that are quality color reproductions of the subject matter photographed, including quality reproductions of human flesh tones.
- 5. There are numerous film processing laboratories that develop Kodachrome film. Rodak has ten such processing laboratories located in nine different states which together provide nationwide service. Exhibit A, compiled from company records kept in the normal course of business and attached to this affidavit, lists these ten Kodak film processing laboratories and identifies the cities and states in which they are located. As Exhibit A indicates, two of these Kodak film processing laboratories are located in the State of California, one in Palo Alto and one in Los Angeles. Additionally, there

- 6. Non-Kodak film processing laboratories began developing Kodachrome film in the mid to late 1950s and since that time such laboratories have been in continuous operation in varying but generally increasing numbers.
- 7. The Kodachrome film process specialists employed by Kodak, referred to in paragraph 2, are individuals who have many years of experience with both the company and the Kodachrome film developing process and they provide competent support to non-Kodak Kodachrome film processing laboratories as well as to Kodak laboratories.
- 8. There are three Kodak Kodachrome film process specialists and each one provides assistance and advice to approximately one-third of the non-Kodak Kodachrome film processing laboratories.

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- 10. The Kodak specialists and I can and do call on highly trained photographic scientists, engineers and technicians employed by Kodak who, with the aid of sophisticated equipment located in Rochester, New York, provide additional assistance to these independent laboratories when necessary.
- 11. Kodak also periodically gives Kodachrome film processing seminars for employees of non-Kodak laboratories which are designed to provide them with information that will assist them in producing high quality Kodachrome film processing.
- 12. Training courses in chemical analysis are made available to employees of independent laboratories at Kodak's marketing Education Center in Rochester, New York. Such courses are designed to provide information that is useful to individuals involved in running the Kodachrome film process.
- 13. Non-Kodak Kodachrome film processing laboratories nave access to the same technical information and chemicals in developing Kodachrome film as those used by Kodak's own film processing laboratories. Therefore, these non-Kodak Kodachrome

film processing laboratories have the capability of being able to achieve the same quality of product. I am familiar with the general quality of the work done by these non-Kodak Kodachrome film processing laboratories. I am also familiar with the quality of color reproductions on magazine pages used by the plaintiffs in this action. The work done by these non-Kodak Kodachrome film processing laboratories is of a sufficiently nigh quality that the Kodachrome transparencies they produce can be used to obtain quality color reproductions on magazine pages similar to those of plaintiffs in this action.

14. Because of my position, I also have knowledge of Kodak Ektachrome Professional film, the Ektachrome film developing process, and the uses of Ektachrome professional film. Ektachrome Professional film was developed to meet the needs of professional photographers who do commercial photographic work. It is widely used by photographers doing work for magazines and advertising agencies.

15. Ektachrome film was first marketed by Rodak in 1946. This film, like Rodachrome film, when exposed and developed, produces color transparencies that depict a color reproduction of the subject matter photographed. However, unlike Rodachrome film, Ektachrome film is manufactured in such a way that the photosensitive emulsion coated on the film during manufacture contains the color dyes used to create a color image on the film when it is developed. Because of this difference, there is no need to include solutions containing color dyes in

the process used to develop Ektachrome film. Therefore, that process is much simpler to operate and provides faster development than the more complicated Kodachrome film developing process. Additionally, the cost of the equipment required to develop Ektachrome film is substantially less than that required to develop Kodachrome film because the Ektachrome process is less complex.

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Extachrome E-6 films and a faster, simpler process for developing these films. These new films, developed with the needs of professional photographers in mind, are referred to as Extachrome professional films and they are widely used by professional photographers who do photographic work for magazines, advertising agencies, etc. Extachrome professional film, like Kodachrome film, is capable of providing color transparencies that are quality color reproductions of subject matter photographed, including quality reproductions of human flesh tones. See Exhibit C attached to this affidavit.

17. Because the Ektachrome films are more widely used by professionals and easier to process than Kodachrome film, and because the cost of the equipment required to process them is substantially less than that required to process Kodachrome film, there are many more Ektachrome film processing laboratories than Kodachrome film processing laboratories. Kodak has only a small percentage of the total number of Ektachrome film processing laboratories in this country. Specifically, it has

1 ten film processing laboratories in nine states that develop 2 Ektachrome film. Exhibit A, compiled from company records kept I in the normal course of business and attached to this affidavit, 4 lists these ten Kodak Ektachrome film processing laboratories the same ten that also process Kodachrome film - and identifies the cities and states in which they are located, including 7 one in Los Angeles and one in Palo Alto, California. Each of by these Kodak film processing laboratories develops Ektachrome 9 film received from both amateur and professional photographers 10 in the same manner; no special handling is provided for film 11 submitted by professional photographers. I also reviewed Kodak 12 business records kept in the normal course of business that 13 identified non-Kodak film processing laboratories in the State 14 of California as of May 2, 1980, other than those licensed by 15 Kodak to process Kodachrome film, which had purchased Kodak 16 developing chemicals or otherwise dealt with Kodak in some 17 manner. These records indicate that there are at least 300 18 such non-Kodak film processing laboratories in California that 19 process color negative and/or Ektachrome films. There are more 20 non-Kodak film processing laboratories in the State of California 21 which do not appear in Kodak's business records. Kodak's 22 business records indicate that as of May 2, 1980, in the State 23 of California alone, there were 107 non-Kodak Ektachrome 24 "professional" film processing laboratories. Such "professional" 25 laboratories cater to the needs of the professional photographer using Ektachrome film. They accept special orders and provide a 26 27 quick "turn-around" processing time on special orders for 28 professional photographers. By way of contrast, there are more

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21. I estimate that the cost of establishing a new high volume Kodachrome film processing facility, including the purchase of new processing equipment, is approximately \$500,000, only \$600 or which is required by Kodak for a Kodachrome film processing license. Such a facility can be run by three properly trained people.

- 22. The cost of equipment used to develop Ektachrome professional film varies widely depending on the needs of the user. There are three categories of Ektachrome film processing equipment:
- (a) Amateur photographers develop Ektachrome film with film processing equipment that ranges in cost from \$10 for equipment used in manual processing to \$5,000 for low volume automated processing equipment.

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- (b) A company that needs to develop a low to medium volume of Ektachrome professional film can install, at a cost of approximately \$15,000, an automated film processor capable of producing high quality results. This processor processes both roll and sheet film. This processor can be operated by one person.
- (c) A company with a need to process a high volume of Ektachrome professional film can install, at a cost of approximately \$50,000, an automated processor capable of processing up to 5,000 rolls of film a day that produces high quality results.
- 23. Based on my understanding of the film processing needs of magazines such as Hustler and Chic, I believe the processing equipment described in subparagraph (b) of paragraph 22 above would very adequately fill these needs, both from volume and quality viewpoints. For an investment of approximately \$15,000, they could have equipment that would process 35mm Ektachrome professional film used by photographers to photograph models and Ektachrome sheet film to make enlargements of 35mm slides which can be used as an intermediate step in the publishing process.
- 24. Hustler and Chic could install Kodachrome film processing equipment for their own use and increase the volume of film processed by that equipment and thus offset their investment by processing film for others in addition to their own film. Additionally, dustler and Chic could reduce the cost

required of them to install Kodachrome film processing equipment by installing this equipment as part of a joint venture with other companies that are in the business of photographing sexually explicit pictures and publishing them. Either of these options would also allow Hustler and Chic and joint venturers, if any, to operate the process to suit the needs of companies publishing such pictures.

25. During the time I was employed by Kodak as a photographer, I photographed models using both Ektachrome and Kodachrome film and obtained excellent results with both films. At times my assignments included photographing models for the purpose of providing transparencies to photographic experts who determined how accurately the films produced flesh tones and my experience was that both films provided high quality flesh tone reproduction. Furthermore, new and improved Ektachrome professional films introduced after I ceased working as a Kodak pnotographer provide an even higher quality flesh tone reproduction than those I used as a photographer. See Exhibit C attached to this afridavit.

REYNOLDS ALLINGER

Sworn to and subscribed before me, a Notary Public in and for the County of Monroe, in the State of New York, at the City of Rochester, in said County and State, this 44 day of June 1980.

NUTARY PUBLIC OF THE STATE

OF NEW YORK

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EXHIBIT A

All Kodak Film Processing Laboratories in the United States

1017 Morth Las Palmas Avenue Los Angeles, California 90038

925 Page Mill Road Palo Alto, California 94304

4729 Miller Drive Chamblee, Georgia 30341

Color Print and Processing Laboratory Post Office Box 1260 (Mail) Honolulu, Hawaii 96807

1065 Kapiolani Boulevard Honolulu, Hawaii 96814

1712 Prairie Avenue Chicago, Illinois 60616 l Choke Cherry Road Rockville, Maryland 20850

16-31 Route #208 Fair Lawn, New Jersey 07410

Kodak Park Division Color Print and Processing Rochester, New York 14650

1100 East Main Cross Street Findlay, Ohio 45840

3131 Manor Way Dallas, Texas 75235

PROCESSORS OF KODACHROME FILM

Eastern Region

Allprints 174 South Main Street Mansfield. Chio 44901

Guardian Industries 43043 West Nine Hile Road Northville, Michigan 48167

Hite Photo 693 West Milwaukee Avenue Detroit, Michigan 48202

Dynacolor Corporation 616 Dwight Street P. O. Box 338 Springfield, Massachusetts 01103

Wonday Film Service, Inc. 615 South Avenue Wilkinsburg, Pennsylvania 15221

Guardian Ind. Race Street Lehigh Valley Industrial Park Allentown, Fennsylvania 18103

Dynacolor Corporation 800 North Pitt Street Alexandria, Virginia 22314

Midwestern Region

Dymacolor Corporation 1407 West 5th Street Northfield, Minnesota 55057

Pako Photo 1201 West Broadway Minneapolis, Minnesota 55411

Berkey Photo Inc. 220 Graceland Des Plaines, Illinois 60016

Dynacolor Corporation 401 Hankes Avenue Surpra, Illinois 60505

Par West

Berkey Film Processing 102 Wonder Color Lane 5. San Francisco, California 94080

Technicolor Inc. 4330 Roseville Road N. Highlands, California 95660

Dynacolor Corporation 11915 West Olympic Boulevard Los Angeles, California 90054

Drewry Photocolor Corporation 211 South Lake Street Burbank, California 91502

Fox Photo 2030 El Cajon Boulevard San Diego, California 92104

Guardian Industries 1353 San Fernando Road Los Angeles, California 90065

Grand Canyon Color Lab 4456 East Thomas Phoenix, Arizona 85013

Phototron 2 North 30th Street Phoenix, Arizona 85034

Phototron Spruce and Bloomington Rialto, California 92376

Hawaii

Technicolor Inc. 760 Halekauwila Honolulu, Mawaii 96813

Southwestern Region

Dynacolor Corporation 3221 Halifax Street Dallas, Texas 75207

EXHIBIT B (page 1 of 2) - 127-

(Southwestern Region cont.)

Kolor Print 2121 Thayer Street Little Rock, Arkansas 77202

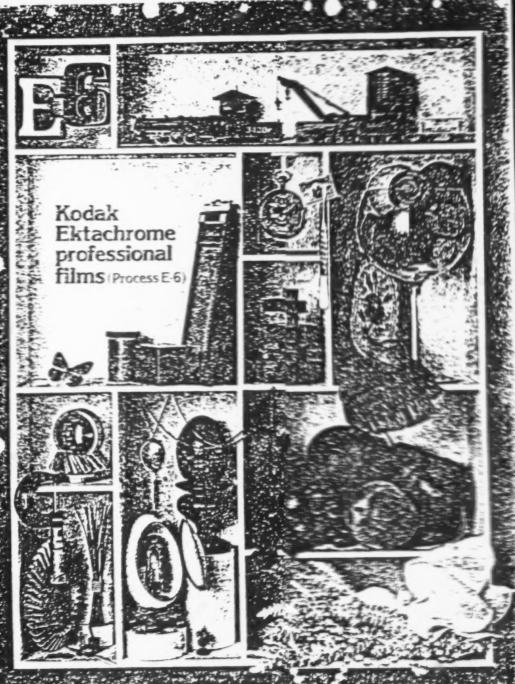
Southeastern Region

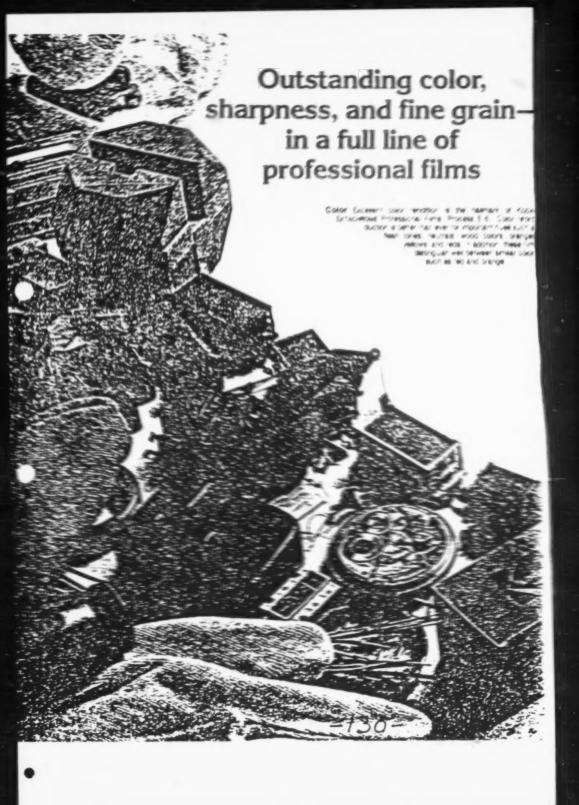
Champagne Color, Inc. 1917 North Orange Avenue Orlando, Florida 32804

Colorcraft of Charlotte, Inc. 2515 Distribution Street Charlotte, North Carolina 28233

Columbus Photo Service, Inc. 2716 Lumpkin Road Columbus, Georgia 31903

Dynacolor Corporation 2043 Lawrence Avenue East Point, Georgia 30344





Sharpness, Fine Grain, and Speed

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Full range of sizes

SKTACHAGINE Professional Films (Process 1-6) are made in a full range of sides, 135, 120, long roll sizes, and standard sheet sizes, with daylight and fungsten emusions

ASA 160 and 200 times are available in , 120, and long roll sizes only. Now, 35 mm sides can be made with the same professional emulsions used for medium-and large-format principricipry. For making sades of artwork. Extraclimoses 50 migressional Prof. (Tungsien) will be borocary valuable.

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For complete details, consult Kodak gudacason 6-37, Kodak Erracintoel Prosessional Films (Process 6-4). Single copies are avellating at no charge from Decarment 412-L. Eastman Kodak Company, 343 Sales Sirest, Rochester, NY 1450.

Convenient-to-Process Duplicating Films

Extraciencial Dupactoring Films (Process E-6) leature excession color reproduction and easiest-ever processing for both sheet and col films: seacily the same as for all other Extraciences, Professional Films (Process E-6). No opecial development times or other process changes are necessary, so Dupactoring Film can be processed with camers original films.

In sheet sizes. Extracretiset Duplicating Fam 6121 (Process E-6) permits making same-aza duplicates or energing stoke to depres transparencies, with all the potential of paper printing fromony, convictions, condicationing and burning in delivers, and multiple images. To make duplicate score. Smoother Size Supleaning Film SST: Process 5-61 is recommended.

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KODAK EKTACHROME Chemicals and Process Control Strips for Process E-6

Konax Extacusous Chemicale (Process E-8)

36°C process, approximately 32 minutes (depending on equipment) DNA Short drying time. for higher productively. Single process for all NODAX EXTACHRONE Professional and Duckcating Firms (Process E-6). No time-consuming reexposure step. Only seven processing solutions needed, all supplied as easy-to-mix iiguid concentrates, reedy to dilute and use Process E-6 offers improved uniformity and process stab for consistent high-quality results without frequent adjustment of the process. Evenness of processing, even on large sheets, is also improved. The process meets expected environmental requirements. and when operated to capacity uses less water and energy than earner DEDCESSES.

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Konax Stabilizer, Process E-6

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KODAK Deloamer, Process E-6

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Chemicale labeled "AR" are for Process E-SAR. They are available in 5-gaton Cubtainer* packages, and can be used for in-une daugon recienshment of the KODAX EXTACHRONS E-6 Processor or by following the directions on the container for other modes of processing. Unopened Cubitsiner dechages, filled with ongrinal contents, can be stored up to one year list room conditions. Do not store chemicals in a not location, as this can adversary affect their strength

Kobax Control Strips (Process E-4)

Sensitometrically exposed filmstrips intended for process monitoring and control purposes in Process E-6

· Rochester-processed sind on same emulsion included for compan-NOT DUTDONNS

Unit pechage consists of more heat-seat for envelopes, each containing ten stops of him 514 inches long by 35 mm wide

Also evaluable in 35 mm x 100-ft rolls with noticned cutoff manks every.

9% inches, yielding approximately 125 strips . Since must be stored at 0°F (-18°C) pnor to processing

CAT NO	SUZE	GUANTITY
	514 inches long x 35 mm wide	30
122 6554	35 mm x 100-ft roll (Saec. 382)	-



Repeat your successes!



KODAK EXTACHROME Slide Duplicating Film 5071 (Process E-6) KODAK EXTACHROME Duplicating Film 6121 (Process E-6)

When you deliver an original transparency to a calent or printer there's always the chance that is gone for good. When or distinguished to further use—and there's no negative to fail back on Of course, you can shoot extra originals. But chances are that one will have the best expression composition, exposure. The others will be associated. The answer?

very likely making top-clusity subjects transparencies it is more practical than ever lease: than ever lease than ever lease. This more practical than ever lease: than ever lease that every lea

Entackhows Dublicating Rims. Process 5:61 are convenient to use and ust as convenient to use and ust as convenient to process. Use Process 5:6 entroor time changes or other adulatments—which means that any processing line or machine handling Process 5:6 can process. Dublicating Rims in the same formats. And if you can ill processing has not processed the process that it is not considered that the processing about the processing about the processing service.

Repeat your successes—with dublicates on ExtrackRows Dublicating Films

For Extachedure Dupificating and Extackedure Potessional Films (Process E-6), see your desier in Kodax photographic supplies. JOHN R. MCDONOUGH
J. STEVEN GREENFELD
BALL, HUNT, HART, BROWN AND BAERWITZ
450 North Roxbury Drive, Fifth Floor
Beverly Hills, California 90210

(213) 278-1960

 Attorneys for Defendant Eastman Kodak Company

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

HUSTLER MAGAZINE, INC., a)
corporation, and CHIC)
MAGAZINE, INC., a corporation,)

CIVIL ACTION NO. 80 00561-IE

DECLARATION OF OSCAR SCHOCK

Plaintiffs,

VS.

EASTMAN KODAK COMPANY, a corporation,

Defendant.

I, OSCAR SHOCK, do hereby declare as follows:

1. I have been continuously employed by Eastman Kocak Company ("Kodak" herein) since 1940. From 1940 to 1965 I was employed at Kodak's Hollywood, California film processing laboratory. I began in 1940 by cleaning developing racks and feeding film on and off the processing machine. From 1940 to 1943 I received extensive training and experience as a film processor and was responsible for operating the entire processing machine. By 1948 I had received extensive training and

(a) chemical mixing;

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- (b) chemical analysis;
- (c) film loss and error control; and
- (d) overall quality control.

By 1960 I had received extensive training and at lease five years experience in the processes used to develop Kodachrome commercial original film and the entire line of Ektachrome film. From 1960 to 1965, I was in charge of film quality control for Kodak's entire Hollywood processing laboratory and was responsible directly to the laboratory manager for the quality of the entire line of films developed by the Hollywood laboratory.

2. From 1965 to the present, I have been responsible for providing technical advice and assistance to non-Kodak Kodachrome film processing laboratories in the Western region of the United States. I am one of three Kodachrome film process technical specialists employed by Kodak who provide advice and assistance to all the licensed non-Kodak Kodachrome film processing laboratories in the United States. Exhibit A, compiled from Kodak records kept in the normal course of business and attached to this Declaration, lists the ten non-Kodak Kodachrome film processing laboratories which I advise and identifies the cities and states in which these laboratories are located. As Exhibit A indicates, there are

seven non-Kodak Kodachrome film processing laboratories in California, two in Arizona and one in Hawaii.

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- 3. I make a routine call on each of these non-Kodak Kodachrome film processing laboratories on the average of once every two months except for the Hawaii laboratory which I visit approximately twice a year. In addition, I am available on call 24 hours a day to visit any of these non-Kodak Kodachrome film processing laboratories which ask for my assistance in operating the Kodachrome film developing process. There is no charge to these licensed non-Kodak Kodachrome film processing laboratories for my services.
- 4. I can and do call on highly trained photographic scientists, engineers and technicians employed by Kodak who, with the aid of sophisticated equipment located in Rochester, new York, provide additional assistance to these non-Kodak Kodachrome film processing laboratories when necessary.
- 5. Kodak also periodically gives Kodachrome film processing seminars to employees of these non-Kodak Kodachrome film processing laboratories which are designed to provide them with information that will assist them in producing high quality Kodachrome film processing.
- 6. Training courses in chemical analysis are made available to employees of these non-Kodak Kodachrome film processing laboratories at Kodak's marketing educational center

- laboratories have access to the same technical information and chemicals in developing Kodachrome film as Kodak's own film processing laboratories. Therefore, these non-Kodak Kodachrome film processing laboratories have the capability of being able to achieve the same quality of product. I am familiar with the general quality of the work done by these non-Kodak Kodachrome film processing laboratories. I am also familiar with the quality or color reproductions on magazine pages used by the plaintiffs in this action. The work done by these non-Kodak Kodachrome film processing laboratories is of a sufficiently high quality that the Kodachrome transparencies they produce can be used to obtain quality color reproductions on magazine pages similar to those of plaintiffs in this action.
- 8. I estimate that the cost of establishing a new high-volume Kodachrome film processing facility, including the purchase of new processing equipment, is approximately \$500,000, only \$600 of which is required by Kodak for a Kodachrome film processing license. Such facility can be run by three properly trained people.

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LICENSED NON-KODAK KODACHROME FILM PROCESSING LABORATORIES ASSISTED BY OSCAR SCHOCK

Berkey Film Processing 102 Wonder Color Lane S. San Francisco, California 94080

Technicolor Inc. 4330 Roseville Road N. Highlands, California 95660

Dynacolor Corporation 11915 West Olympic Boulevard Los Angeles, California 90054

Drewry Photocolor Corporation 211 South Lake Street Burbank, California 91502

Fox Photo 2030 El Cajon Boulevard San Diego, California 92104

Guardian Industries 3353 San Fernando Road Los Angeles, California 90065

Grand Canyon Color Lab 4456 East Thomas Phoenix, Arizona 85013

Phototron 2 North 30th Street Phoenix, Arizona 85034

Phototron Spruce and Bloomington Rialto, California 92376

Technicolor Inc. 760 Halekauwila Honolulu, Hawaii 96813

-140-

EXHIBIT A

1 JOHN R. MCDONOUGH J. STEVEN GREENFELD 2 BALL, BUNT HART, BROWN AND BAERWITZ 450 North Roxbury Drive, Fifth Ploor 3 Beverly Hills, California 90210 4 (213) 278-1960 5 Attorneys for Defendant Eastman Kodak Company 6 7 8 UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA 9 10 HUSTLER MAGAZINE, INC., a 11) CIVIL ACTION NO. 80 00561 Id corporation, and CHIC MAGAZINE, INC., a corporation,) 12 DECLARATION OF 13 Plaintiffs. LARRY B. STEVENSON 14 VS. 15 EASTMAN KODAK COMPANY, & corporation, 16 Defendant. 17 18 19 I, LARRY B. STEVENSON, do hereby declare as follows: 20 21 1. I have been continuously employed by Eastman 22 Kodak Company ("Rodak" herein) from June, 1966 to the present. 23 24 2. For five years prior to joining Kodak in 1966, I 25 did business as a portrait photographer in western Oklahoma. 26 11 27 11 28 11

- 3. For one year commencing in 1966, I was trained by Rodak in Rochester, New York, to be a Technical Sales Representative for products in Rodak's Professional and Finishing Markets Division. I received extensive training and experience in the following technical areas of film processing:
 - (a) Rodak packaged chemical mixing;
 - (b) Process monitoring; and
- (c) The study of how photograpic products designed for the professional photographer are used and processed properly.

My training in these respects included the study of Kodak Extachrome film.

- 4. In 1967, I was transferred by Kodak to Kansas City and functioned there for the next three and one-half years representing Kodak as a Technical Sales Representative calling on photographers and non-Kodak Ektachrome film processing labortories in the area. I was responsible for helping customers obtain the maximum quality from our products, receiving comments from customers, and providing technical assistance to these customers upon their request.
- 5. In 1973, I was transferred by Kodak to Chicago, Illinois where I performed essentially the same functions as a Kodak Technical Sales Representative, but calling on a larger territory than I had done in Kansas City. I was in Chicago until 1973.

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- 7. I make routine calls on twenty-five non-Kodak professional laboratories some of which specialize exclusively in Ektachrome film processing. In addition, I am available on call eight hours a day, five days a week, to visit any of these non-Kodak Ektachrome professional film processing laboratories that asks for my assistance in operating the Ektachrome film developing process. There is no charge to these non-Kodak professional film processing laboratories for my services.
- 8. I can and do call on highly trained photographic scientists, engineers and technicians employed by Rodak who, with the aid of sophisticated equipment located in Rochester, New York, provide additional assistance to these non-Rodak Extachrome professional film Processing laboratories when necessary.

9. Kodak also periodically gives Ektachrome film processing seminars to employees of these non-Kodak Ektachrome professional film processing laboratories which are designed to provide them with information that will assist them in producing high quality Ektachrome film processing.

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available to employees of these non-Kodak Ektachrome professional film processing laboratories at Kodak's marketing educational center in Rochester, New York and Whittier, California. Such courses are designed to provide useful information to individuals involved in running the Ektachrome film process.

processing laboratories have access to the same technical information and chemicals in processing Ektachrome film as Kodax's own film processing laboratories. Therefore, these non-Kodak Ektachrome professional film processing laboratories have the capability of being able to achieve the same quality of product. I am familiar with the general quality of the work done by these non-Kodak Ektachrome professional film processing laboratories. I am also familiar with the quality of color reproductions on magazine pages used by the plaintiffs in this action. The work done by these non-Kodak Ektachrome professional film processing laboratories is of a sufficiently nigh quality that the Ektachrome transparencies they produce can be used to obtain quality color reproductions on magazine pages similar to those of plaintiffs in this action. Moreover,

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- 12. The cost of equipment used to develop Ektachrome professional film varies widely depending on the needs of the
 user. There are three categories of Ektachrome film processing
 equipment:
- (a) I estimate that amateur photographers develop Ektachrome film with film processing equipment that ranges in cost from \$10.00 for equipment used in manual processing to \$5,000 for low-volume automated processing equipment.
- (b) I estimate that a company that needs to develop a low to medium volume of Ektachrome professional film can install, at a cost of approximately \$15,000, an automated film processor capable of producing high quality results. This processor processes both roll and sheet film. This processor can be operated by one person.
- (c) I estimate that a company with a need to process a high volume of Ektachrome professional film can install, at a cost of approximately \$50,000, an automated processor capable of processing up to 5,000 rolls of film a day that produces high quality results.

is true and correct and that this Declaration was executed on June 4, 1980 at Beverly Bills, California.

-6- -146-

I declare under penalty of perjury that the foregoing

1 JOHN R. MCDONOUGH J. STEVEN GREENFELD BALL, HUNT, HART, BROWN AND BAERWITZ 2 450 North Roxbury Drive, Fifth Floor 3 Beverly Hills, California 90210 (213) 278-1960 5 Attorneys for Defendant Eastman Kodak Company 6 7 UNITED STATES DISTRICT COURT 8 9 CENTRAL DISTRICT OF CALIFORNIA 10 11 HUSTLER MAGAZINE, INC., a corporation, and CHIC | MAGAZINE, INC., a corporation, | 12 13 Plaintiffs, 14 VS. 15 EASTMAN KODAK COMPANY, a corporation, 16 Defendant. 17

) CIVIL ACTION NO. 80 00561 IB AFFIDAVIT OF

Robert K. Ziegler

STATE OF New Jersey

COUNTY OF Bergen

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SS.

Robert K. Ziegler , of full age, being I, duly sworn according to law, upon my oath depose and say:

1. I am employed by Eastman Kodak Company ("Kodak") at Kodak's film laboratory in Fair Lawn, New Jersey, Customer Service Manager. As such, I am responsible for, among other things, the safe-keeping of sexually explicit transparencies, negatives and prints ("pictures") withheld

from customer orders submitted to this film processing laboratory.

- 2. All sexually explicit pictures withheld from customer orders submitted to this film processing laboratory are stored in a secured file either by myself or those working at my direction for purposes of safe keeping.
- 3. I was directed by counsel for Kodak to review the contents of the file specified in paragraph 2 and determine whether, during the period from February 13, 1979 to present, any pictures in that file had been withheld from orders submitted under the customer names Hustler, Hustler Magazine, Chic, or Chic Magazine or any similar customer names.
- 4. I have personally conducted the review described in paragraph 3 above and I was unable to locate any picture withheld during the specified period from orders submitted under the indicated customer names or any similar customer name.

THIT!

Sworn to and subscriped before me, a Notary Public in and for the County of

/it as a , in the State of Paw Shines

, at the City of - in said County

and State, this 37"day of

1980.

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1 JOHN R. MCDONOUGH J. STEVEN GREENFELD 2 BALL, HUNT, HART, BROWN AND BAERWITZ 450 North Roxbury Drive, Pifth Ploor 3 severly Hills, California 90210 (213) 278-1960 5 Attorneys for Defendant Eastman Kodak Company 6 7 8 UNITED STATES DISTRICT COURT 9 CENTRAL DISTRICT OF CALIFORNIA 10 11 HUSTLER MAGAZINE, INC., a) CIVIL ACTION NO. 80 00561 IH corporation, and CHIC 12 MAGAZINE, INC., a corporation,) AFFIDAVIT OF 13 Plaintiffs, J. BRUCE MARTIN 14 vs. 15 EASTMAN KODAK COMPANY, a corporation, 16 Defendant. 17 18 STATE OF TEXAS SS. 19 COUNTY OF DALLAS 20 21 , of full age, being I. J. Bruce Martin 22 duly sworn according to law, upon my oath depose and say: 23 24 1. I am employed by Eastman Kodak Company ("Kodak") 25 at Kodak's tilm laboratory in Dallas, Texas, 26 Customer Service Manager. As such, I am responsible for,

among other things, the safe-keeping of sexually explicit

transparencies, negatives and prints ("pictures") withheld

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- 2. All sexually explicit pictures withheld from customer orders submitted to this film processing laboratory are stored in a secured file either by myself or those working at my direction for purposes of safe keeping.
- 3. I was directed by counsel for Kodak to review the contents of the file specified in paragraph 2 and determine whether, during the period from February 13, 1979 to present, any pictures in that file had been withheld from orders submitted under the customer names Hustler, Hustler Magazine, Chic, or Chic Magazine or any similar customer names.
- 4. I have personally conducted the review described in paragraph 3 above and I was unable to locate any picture withheld during the specified period from orders submitted under the indicated customer names or any similar customer name.

1 - 1 Suca Martin .

Sworn to and subscribed before me, a Notary Public in and for the County of in the State of at the City of in said County and State, this day of 1980.

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NOTARY PUBLIC OF THE STATE -150 -

JOHN R. MCDONOUGH J. STEVEN GREENFELD BALL, MUNT, HART, BROWN AND BAERWITZ 450 North Roxbury Drive, Fifth Floor Beverly Hills, California .90210 (213) 278-1960 Attorneys for Defendant Eastman Kodak Company UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA HUSTLER MAGAZINE, INC., a corporation, and CHIC MAGAZINE, INC., a corporation,) Plaintiffs,

) CIVIL ACTION NO. 80 00561 IH APPIDAVIT OF

DAVID G. LYNCH

vs.

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EASTMAN KODAK COMPANY, a corporation,

Defendant.

I, DAVID G. LYNCH

STATE OF ILLINOIS COUNTY OF COOK

SS.

, of full age, being

duly sworn according to law, upon my oath depose and say:

1. I am employed by Eastman Kodak Company ("Kodak") at Kodak's film laboratory in CHICAGO, ILLINOIS Customer Service Manager. As such, I am responsible for, among other things, the safe-keeping of sexually explicit transparencies, negatives and prints ("pictures") withheld

- 2. All sexually explicit pictures withheld from customer orders submitted to this film processing laboratory are stored in a secured file either by myself or those working at my direction for purposes of safe keeping.
- 3. I was directed by counsel for Kodak to review the contents of the file specified in paragraph 2 and determine whether, during the period from February 13, 1979 to present, any pictures in that file had been withheld from orders submitted under the customer names Hustler, Hustler Magazine, Chic, or Chic Magazine or any similar customer names.
- 4. I have personally conducted the review described in paragraph 3 above and I was unable to locate any picture withheld during the specified period from orders submitted under the indicated customer names or any similar customer name.

Janie . T. Their

Sworn to and subscribed before me, a Notary Public in and for the County of rook, in the State of CHICAGO, in said County and State, this 28 day of MAY, 1980.

NOTARY PUBLIC OF THE STATE

My Commission Expires May 17, 1983

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1 JOHN R. MCDONOUGH J. STEVEN GREENFELD 2 BALL, HUNT, HART, BROWN AND BAEKWITZ 450 North Roxbury Drive, Pifth Ploor Beverly Hills, California 90210 3 (213) 278-1960 5 Attorneys for Defendant Eastman Kodak Company 8 7 UNITED STATES DISTRICT COURT 8 CENTRAL DISTRICT OF CALIFORNIA 9 10 11 corporation, and CHIC MAGAZINE, INC., a corporation,) 12 13 Plaintiffs, 14 VS. EASTMAN KODAK COMPANY, a 15

HUSTLER MAGAZINE, INC., a) CIVIL ACTION NO. 80 00561 IH

AFFIDAVIT OF

THOMAS F. SPIESS

corporation,

Defendant.

STATE OF NEW YORK

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COUNTY OF MONROE

SS.

I, Thomas F. Spiess , of full age, being duly sworn according to law, upon my oath depose and say:

1. I am employed by Eastman Kodak Company ("Kodak") at Kodak's film laboratory in Rochester, New York as Customer Service Manager. As such, I am responsible for, among other things, the safe-keeping of sexually explicit transparencies, negatives and prints ("pictures") withheld

JOHN R. MCDONOUGH J. STEVEN GREENFELD BALL, HUNT, HART, BROWN AND BAERWITZ 450 North Roxbury Drive, Fifth Floor severly Hills, California 90210 (213) 278-1960 Attorneys for Defendant Eastman Kodak Company UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA HUSTLER MAGAZINE, INC., a corporation, and CHIC MAGAZINE, INC., a corporation,) Plaintiffs, VS.

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) CIVIL ACTION NO. 80 00561 IH

AFFIDAVIT OF

J. Warren Fields

EASTMAN KODAK COMPANY, a corporation,

Defendant.

STATE OF MARYLAND COUNTY OF MONTGOMERY

SS.

I. J. Warren Fields , of full age, being duly sworn according to law, upon my oath depose and say:

1. I am employed by Eastman Kodak Company ("Kodak") at Kodak's film laboratory in Rockville, Maryland as Customer Service Manager. As such, I am responsible for, among other things, the safe-keeping of sexually explicit transparencies, negatives and prints ("pictures") withheld

from customer orders submitted to this film processing laboratory.

- 2. All sexually explicit pictures withheld from customer orders submitted to this film processing laboratory are stored in a secured file either by myself or those working at my direction for purposes of safe keeping.
- 3. I was directed by counsel for Kodak to review the contents of the file specified in paragraph 2 and determine whether, during the period from February 13, 1979 to present, any pictures in that file had been withheld from orders submitted under the customer names Hustler, Hustler Magazine, Chic, or Chic Magazine or any similar customer names.
- 4. I have personally conducted the review described in paragraph 3 above and I was unable to locate any picture withheld during the specified period from orders submitted under the indicated customer names or any similar customer name.

of time oficed

Sworn to and subscribed before me, a Notary Public fin and for the County of fine the State of many, in the State of in the State of in said County and State, this 27 day of many, 1980.

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NOTARY PUBLIC OF THE STATE

My Commission Expires July 1, 1982

JOHN R. MCDONOUGH J. STEVEN GREENFELD BALL, HUNT, HART, BROWN AND BAERWITZ 450 North Roxbury Drive, Fifth Floor Beverly Hills, California 90210

(213) 278-1960

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Attorneys for Defendant Eastman Kodak Company

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

) CIVIL ACTION NO. 80 00561 IH HUSTLER MAGAZINE, INC., a corporation, and CHIC AFFIDAVIT OF MAGAZINE, INC., a corporation,) THOMAS J. SPILLMAN Plaintiffs, VS. EASTMAN KODAK COMPANY, a corporation, Defendant. STATE OF OHIO SS. COUNTY OF HANCOCK

Thomas J. Spillman , of full age, being duly sworn according to law, upon my oath depose and say:

1. I am employed by Eastman Kodak Company ("Kodak") at Kodak's film laboratory in Findlay, Ohio as Customer Service Manager. As such, I am responsible for, among other things, the safe-keeping of sexually explicit transparencies, negatives and prints ("pictures") withheld

1 from customer orders submitted to this film processing laboratory 2 3 2. All sexually explicit pictures withheld from 4 customer orders submitted to this film processing laboratory are stored in a secured file either by myself or those working at my 5 6 direction for purposes of safe keeping. 7 8 3. I was directed by counsel for Kodak to review the 9 contents of the file specified in paragraph 2 and determine 10 whether, during the period from February 13, 1979 to present, 11 any pictures in that file had been withheld from orders sub-12 mitted under the customer names Hustler, Hustler Magazine, Chic, or Chic Magazine or any similar customer names. 13 14 15 I have personally conducted the review described 16 in paragraph 3 above and I was unable to locate any picture 17 withheld during the specified period from orders submitted under 18 the indicated customer names or any similar customer name. 19 Thomas J. S 20 21 Sworn to and subscribed 22 before me, a Notary Public in and for the County of 23 Hancock , in the State of __, at the City of Ohio 24 Findlay , in said County and State, this 28th day of 25 May , 1980. 26 27 NUTARY PUBLIC OF Ohio 28 MARILYN IS PALLIER Marge to the transfer

-2- -157-

JOHN R. MCDONOUGH
J. STEVEN GREENFELD
BALL, HUNT, HART, BROWN AND BAERWITZ
450 North koxpury Drive, Fifth Floor
Beverly Hills, California 90210

(213) 278-1960

Attorneys for Defendant Eastman Kodak Company

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BUSTLER MAGAZINE, INC., a) CIVIL ACTION NO. 80 00561 IN corporation, and CHIC) AFFIDAVIT OF Plaintiffs,) DOUGLAS LEE) CASTMAN KODAK COMPANY.

EASTMAN KODAK COMPANY, a corporation,

Defendant.

STATE OF MAWAII : SS.
COUNTY OF HONOLULU)

I, DOUGLAS LEE , of full age, being duly sworn according to law, upon my oath depose and say:

1. I am employed by Eastman Kodak Company ("Kodak") at Kodak's film laboratory in Honolulu Hawaii as Laboratory manager. As such, I supervise directly the Customer Service Manager who is responsible for, among other things, the safe-keeping of sexually explicit transparencies, negatives and prints

- 2. All sexually explicit pictures withheld from customer orders submitted to this film processing laboratory are stored in a secured file, with which I am personally familiar, either by the Customer Service Manager or those working at his direction for purposes of safe keeping.
- 3. In the Customer Service Manager's absence, I was directed by counsel for Kodak to review the contents of the file specified in paragraph 2 and determine whether, during the period from February 13, 1979 to present, any pictures in that file had been withheld from orders submitted under the customer names. Hustler, Hustler Magazine, Chic, or Chic Magazine or any similar customer names.
- 4. I have personally conducted the review described in paragraph 3 above and I was unable to locate any picture

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withheld during the specified period from orders submitted under the indicated customer names or any similar customer name.

Dauges

Sworn to and subscribed before me, a Notary Public in and for the County of HONOLULU in the State of , at the City of HAWAII and State, this 30 day of 1980.

STATE

OF HAWAII

commission expines 4/19/81

1 JOHN R. MCDONOUGH J. STEVEN GREENPELD 2 BALL, HUNT, HART, BROWN AND BAERWITZ 450 North Roxbury Drive, Fifth Ploor 3 severly Hills, California 90210 (213) 278-1960 5 Attorneys for Defendant Eastman Kodak Company 8 UNITED STATES DISTRICT COURT 9 CENTRAL DISTRICT OF CALIFORNIA 10 11 HUSTLER MAGAZINE, INC., a) CIVIL ACTION NO. 80 00561 IH corporation, and CHIC 12 MAGAZINE, INC., a corporation,) AFFIDAVIT OF 13 Plaintiffs. DONALD J. MAEDER 14 VS. 15 EASTMAN KODAK CUMPANY, a corporation, 16 Derendant. 17 18 STATE OF CALIFORNIA SS. COUNTY OF LOS ANGELES -9 20 I, Donald J. Maeder , of full age, being 21 22 duly sworn according to law, upon my oath depose and say: 23 24 1. I am employed by Eastman Kodak Company ("Kodak") **9**25 at Kodak's film laboratory in Los Angeles 26 Customer Service Manager. As such, I am responsible for, 27 among other things, the safe-keeping of sexually explicit 28 transparencies, negatives and prints ("pictures") withheld

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as

- 2. All sexually explicit pictures withheld from customer orders submitted to this film processing laboratory are stored in a secured file either by myself or those working at my direction for purposes of safe keeping.
- 3. I was directed by counsel for Kodak to review the contents of the file specified in paragraph 2 and determine whether, during the period from February 13, 1979 to present, any pictures in that file had been withheld from orders submitted under the customer names Hustler, Hustler Magazine, Chic, or Chic Magazine or any similar customer names.
- 4. I have personally conducted the review described in paragraph 3 above and I was unable to locate any picture withheld during the specified period from orders submitted under the indicated customer names or any similar customer name.

Donald J. header

Sworn to and subscribed before me, a Notary Public in and for the County of in the State of Coulciment, at the City of the County and State, this do day of the County and State, the

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NOTARY PUBLIC OF THE STATE
OF



1 JOHN R. MCDUNOUGH J. STEVEN GREENFELD 2 BALL, BUNT, HART, BROWN AND BAERWITZ 450 North Roxbury Drive, Pifth Ploor 3 Beverly Hills, California 90210 (213) 278-1960 Attorn Defendant Eastmu. ... Company UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA 9 10 HUSTLER MAGAZINE, INC., a | CIVIL ACTION NO. 80 00561 IH 11 corporation, and CHIC AFFIDAVIT OF MAGAZINE, INC., a corporation,) 12) PHIL THOMAS ELLIOTT, JR. Plaintiffs, 13 14 vs. 15 EASTHAN KUDAK COMPANY, a corporation, 16 Defendant. 17 STATE OF GEORGIA 18 SS. 19 COUNTY OF DEKALB 20 I, PHIL THOMAS ELLIOTT, JR. , of full age, being 21 22 duly sworn according to law, upon sy oath depose and say: 23 1. I am employed by Eastman Kodak Company ("Kodak") 24 25 a Kodak's film laboratory in Atlanta , Georgia as Labora-2(tory Manager. As such, I supervise directly the Customer Service 27 Manager who is responsible for, among other things, the safe-

28 Keeping of sexually explicit transparencies, negatives and prints

- 2. All sexually explicit pictures withheld from 5 customer orders submitted to this film processing laboratory are stored in a secured file, with which I am personally familiar, 7 eitner by the Customer Service Manager or those working at his 8 direction for purposes of safe keeping.
- 3. In the Customer Service Manager's absence, I was 11 directed by counsel for Kodak to review the contents of the file 12 specified in paragraph 2 and determine whether, during the period 13 from February 13, 1979 to present, any pictures in that file had 14 been withheld from orders submitted under the customer names 15 Hustler, Hustler Magazine, Chic, or Chic Magazine or any similar 16 customer names.
- 18 4. I have personally conducted the review described 19 in paragraph 3 above and I was unable to locate any picture

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1 withheld during the specified period from orders submitted under the indicated customer names or any similar customer name. Sworn to and subscribed

6 before me, a Notary Public in and for the County of ___, in the State of 7 DeKalb Georgia , at the City of Atlanta , in said County and State, this28thday of May , 1980.

OF GEORGIA

Notary Public, Georgia, State At Large My Commission Expires Eat. 26, 1982

STATE OF CALIFORNIA, County of I am the in the above entitled action: I have read the foregoing and know the contents thereof; and that the same is true of my own knowledge, except as to the matters which are therein stated upon my information or belief, and as to those matters I believe it to be true. I disclare, under penalty of perjury, that the foregoing is true and correct. Executed on _____ California (date) (piace) (Signature) (PROOF OF SERVICE BY MAIL - 1013a, 2015.5 C.C.P.) STATE OF CALIFORNIA, COUNTY OF LOS ANGELES 450 N. Roxbury Drive, 5th Floor, Beverly Hills, CA., 90210 June 6 19 80 I served the within NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; AFFIDAVITS, DECLARATIONS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF on the attorneys for plaintiffs in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Beverly Hills, California addressed as follows: Richard D. Agay, Esquire Cooper, Epstein & Hurewitz 9465 Wilshire Boulevard, Suite 800 Beverly Hills, CA. 90212 I declare; under penalty of persury, that the foregoing is true and correct, and that I am employed in the office of a member of the bar of this Court at whose direction service is made. June 6, 1980 of Beverly Hills _ , California Executed on ___ (date) ikellay

Debra L. Hillary

(VERIFICATION - 464 2015.3 C

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JOHN R. MCDONOUGH
J. STEVEN GREENFELD
BALL, HUNT, HART, BROWN AND BAERWITZ
450 North Roxbury Drive, Fifth Floor
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Attorneys for Defendant Eastman Kodak Company

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

HUSTLER MAGAZINE, INC., a CORPORATION, AFFIDAVIT OF MAGAZINE, INC., a corporation, AFFIDAVIT OF Defendant.

Defendant.

STATE OF CALIFORNIA COUNTY OF SANTA CLARA

I, John M. Welch , of full age, being duly sworn according to law, upon my oath depose and say:

l. I am employed by Eastman Kodak Company ("Kodak") at Kodak's film laboratory in Palo Alto, California as Customer Service Manager. As such, I am responsible for, among other things, the safe-keeping of sexually explicit transparencies, negatives and prints ("pictures") withheld

- 2. All sexually explicit pictures withheld from customer orders submitted to this film processing laboratory are stored in a secured file either by myself or those working at my direction for purposes of safe keeping.
- I was directed by counsel for Kodak to review the contents of the file specified in paragraph 2 and determine whether, during the period from February 13, 1979 to present, any pictures in that file had been withheld from orders submitted under the customer names Bustler, Bustler Magazine, Chic, or Chic Magazine or any similar customer names.
- 4. I have personally conducted the review described in paragraph 3 above and I was unable to locate any picture withheld during the specified period from orders submitted under the indicated customer names or any similar customer name.

Sworn to and subscribed before me, a Notary Public in and for the County of 23 Santa Clara , in the State of California, at the City of Palo Alto , in said County and State, this 30 day of

> Marline V NOTARY PUBLIC OF OF



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MARILYN J. DARWIN NOTARY PUBLIC-CALIFORNIA SANTA CLARA COUNTY My commission expires Mar 13, 1983 JOHN R. MCDONOUGH
J. STEVEN GREENFELD
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27 28 Attorneys for Defendant Eastman Kodak Company RECEIVED

JUN 9 1980

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HUSTLER MAGAZINE, INC., a corporation, and CHIC MAGAZINE, INC., a corporation,

Plaintiffs,

VS.

EASTMAN KCDAK COMPANY, a corporation,

Defendant.

CIVIL ACTION NO. 80 00561 IH

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Proposed Only)

The motion of defendant Eastman Kodak Company ("Kodak") for an order granting summary judgment in said defendant's favor and against plaintiffs Hustler Magazine, Inc. ("Hustler") and Chic Magazine, Inc. ("Chic"), having been duly served and filed, came on for hearing on June 30, 1980.

The Court, having considered the evidence and written and oral arguments presented by all parties, now makes the following findings of Fact and Conclusions of Law.

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- Plaintiffs Sustler and Chic were advised on or about December 8, 1978 of Kodak's policy of not returning sexually explicit pictures to customers.
- Rodak's policy of not returning sexually explicit pictures to customers was formulated unilaterally.
- 3. There are many non-Kodak film processing laboratories available to plaintiffs which are capable of achieving the same quality of film processing as Kodak's laboratories.
- 4. There are many non-Kodak film processing laboratories available to plaintiffs which are capable of achieving a quality of film processing adequate for the purposes of plaintiffs.
- 5. Kodak's alleged refusal to return pictures to plaintiffs is not intended to have nor does it in fact have any anticompetitive effect.
- 6. Kodak's challenged practice is not motivated by a specific intent to control prices, exclude competition or engage in other anticompetitive behavior.

-2- -170-

- 7. Kodak's policy of not returning sexually explicit pictures to customers is one which was adopted for sound business reasons and for the purpose of avoiding the injury and expense that would result if Kodak and/or its employees were accused of violating the obscenity laws.
- 8. Kodak's policy was not formulated (a) at the request of, in cooperation with or with the knowledge of law enforcement authorities or (b) with the intent or purpose of participating in the enforcement of the obscenity laws or censoring or suppressing the publication or distribution of sexually explicit magazines.
- The California and federal governments have not delegated any censorial functions to Kodak.
- 10. Rodak does not have in its possession any color transparencies submitted under the name of either plaintiff from February 13, 1979 to February 13, 1980.
- 11. Plaintiffs have acted in bad faith by commencing this baseless federal court action and by not voluntarily dismissing this action after receiving notice of the weakness of their federal claims.
- 12. Plaintiffs have proceeded on a clearly frivolous basis by suing Kodax in this action under 42 U.S.C. §1983.

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plaintiffs.

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CONCLUSIONS OF LAW

1. The Court lacks subject matter jurisdiction of

To the extent any of the foregoing Pindings of Fact

- each and all claims for relief purportedly stated in the complaint.
- 2. If plaintiffs sent film to Kodak after receiving notice of Kodak's policy of not returning sexually explicit pictures to customers, they did so with knowledge of such policy and Kodak nad a contractual right not to return such pictures to
- 3. Rodak's alleged refusal to return various pictures to plaintiffs is not part of a contract, combination or conspiracy within Section 1 of the Sherman Act and plaintiffs state no claim for relief within Sherman 51.
- 4. Kodak has not monopolized or attempted to monopolize the color picture photofinishing and developing market and/or the superior quality photofinishing and developing market with Sherman §2.

1 plaintiffs are not within the target area of the economy endan-2 gered by the alleged violation and do not have standing to claim 3 treble damages and attorney's fees under Section 4 of the 4 Clayton Act. 5

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6. Even assuming the Kodak has violated Sherman \$2, plaintiffs are not entitled to injunctive relief under Section 16 of the Clayton Act because they have suffered no irreparable

injury by reason of the alleged antitrust violation.

5. Even assuming that Rodak has violated Sherman \$2.

- 7. There is no state or federal governmental involvement in Rodak's challenged practice sufficient for plaintiffs to state a claim for relief under 42 U.S.C. §1983 or the First and Fourteenth Amendments to the United States Constitution.
- 8. The grant of exclusive patent and trademark rights does not make the conduct of the grantee state action.
- 9. The Court does not have jurisdiction to determine plaintiffs' claim for declaratory relief as to the constitutionality of the federal and state obscenity statutes because this case lacks the concrete adverseness as between plaintiffs and Kodak necessary to create a justiciable controversy within the Declaratory Judgment Act and Article III, Section 2 of the United States Constitution in that Kodak has no reason or motive to defend the constitutionality of the challenged statutes.

 Rodak is entitled to summary judgment against all plaintiffs.

11. Kodak is entitled to its reasonable attorney's fees incurred in defending this action.

To the extent any of the foregoing Conclusions of Law should properly nave been denominated a Finding of Fact, it is nereby so designated.

DATED:

. 1980

IRVING HILL, Judge United States District Court

-	STATE OF CALIFORNIA, County of
	I am the
STATE STATE SALES	in the above entitled action; I have read the foregoing
	and know the contents thereof; and that the same is true of my own knowledge, except as to the matters which w
	therein stated upon my information or belief, and as to those matters. I believe it to be true.
1	
-	I declare, under penalty of perjury, that the foregoing is true and correct.
9	Executed on
	(date) (place)
	(Signature)
	ABOOF OF SERVICE BY MARY 1013 BOARS CO.D.
	(PROOF OF SERVICE BY MAIL - 1013a, 2015.5 C.C.P.) STATE OF CALIFORNIA, COUNTY OF LOS ANGELES
	I am a Middle AN employed in the county of created; I am over the age of righteen years and not a party to the within mitteled action; my differences and rest as a country of the country
	450 N. Roxbury Dr., 5th Floor, Beverly Hills, Ca., 90210
	On
	CONCLUSIONS OF LAW
	on theattorneys for plaintiffs
	in said action, by placing a true copy thereof enclosed in a seeled envelope with postage thereon fully prepaid, in the United States mail at Beverly Hills, California addressed as follows:
	Richard D. Agay, Esquire Cooper, Epstein & Hurewitz
	9465 Wilshire Boulevard, Suite 800 Beverly Bills, California 90212
	Develly Bills, Calliornia 90212
	I declare; under penalty of perjury, that the foregoing is rue and correct and that I am employed in the office of a member of the bar of this Court at whose direction service is made
	Executed onJune 6, 1980atBeverly HillsCalifornia
	Debra & Kellan
	-175- Debra L. Hillary

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HUSTLER MAGAZINE, INC., a) corporation, and CHIC MAGAZINE, INC., a corporation,)

) CIVIL ACTION NO. 80 00561 IR

MOTION FOR SUMMARY JUDGMENT

MAGAZINE, INC., a corporation
Plaintiffs,

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S

VS.

EASTMAN KODAT COMPANY, a corporation,

Defendant.

Plaintiffs sugmit the following points and authorities in opposition to Defendant's motion for summary judgment.

DATED: August 25, 1980

ALAN ISAACMAN RICHARD D. AGAY COOPER, EPSTEIN & HUREWITZ A Professional Corporation Attorneys for Plaintiff

RICHARD D. AGAY

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Page Cases United States v. Eastman Kodak Co. 226 F.62 (W.D.N.Y. 1915), appeal dismissed, 255 U.S. 578 41 S.Ct. 321 (1920) 26.27.45 United States v. Grinnell Corp. 384 U.S. 563, 86 S.Ct. 1698 (1966) 31,32 United States v. Parke, Davis & Co. 362 U.S. 29, 80 S.Ct. 503 (1960) . 26,28,46 United States v. Thirty Seven Photographs 402 U.S. 363, 91 S.Ct. 1400 (1971) 71 United States v. United Shoe Machinery Corp 110 F.Supp. 235 (D.Mass. 1953), aff'd per curiam 347 U.S. 321 (1954) 32 Walker Distributing Co. v. Lucky Lager Brewing Co. 323 F.25 1 (9th Cir. 1963) 45 Wheeler v. St. Joseph's Hospital 63 Cal.App. 3d 345, 133 Cal.Rptr. 775 (Ct.App. 1977) 21 Wolff v. Selective Service Local Board No. 16 372 F.26 817 (2nd Cir. 1967) 79 Zenith Radio Corp. v. Razeltine Research, Inc. 395 U.S. 103, 69 S.Ct. 1562 (1969) 40 Zwickler v. Roota 392 U.S. 241, 58 S.Ct. 391 (1967) 79 U.S. CONSTITUTION Art. I, §8 Cl 8 66 Amendment I 2,3,22 Amendment V 2,3

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STATUTES

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4	15 U.S.C. §2 (Sherman Act §2)	1,24,25,29,33
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8	18 U.S.C. \$\$1461, 1462, 1465	34
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25	Regulation \$9:02(4) n.107	32
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NATURE OF CLAIMS IN COMPLAINT - INTRODUCTION

In the main, this Memorandum shall attempt to respond to the points raised by Defendant in the order set forth in Defendant's Memorandum of Points and Authorities in Support of the motion summary judgment. 1/2

A. Overview of Plaintiffs' Claims. Plainfiffs allege
that Defendant (Kodak) has monopolized and attempted
to monopolize the market for superior quality photofinishing.
Plaintiffs allege that Defendant has adopted a policy and
practice of confiscating the property (film) delivered to it
for the purpose of developing unless certain conditions it has
adopted are met. Plaintiffs further allege that by virtue of
Defendant's anti-competitive behavior they have been prevented
from obtaining quality pictures from other sources, and that
Defendant has violated Sections 1 and 2 of the Sherman Act (15
U.S.C. §\$1,2).

Plaintiffs further allege that the practice of
Defendant was adopted pursuant to, and therefore under color
of, both federal and state laws, that Plaintiffs have been
deprived of their freedom of speech and press and of their

^{1/} Hereinafter referred to as "Defendant's Brief" or "Def.Br.". The declarations and affidavits filed by Defendant - moving party in support of the motion are referred to as "supporting" declarations, affidavits or sworn statements and those filed by Plaintiffs - responding party are referred to as "opposing" declarations, affidavits or sworn statements. The points raised in Defendant's Brief do not coincide either in content or by order with the nine bases for the motion as set forth on pages 2 and 3 of the Notice of Motion itself.

property without due process of law and that Kodak's practice was adopted allegedly by Kodak in compliance with federal and state laws ("state action") 2/ thereby subjecting Defendant to the proscriptions of the First, Fifth, and Fourteenth Amendments to the United States Constitution and to Section 1983 of Title 42 of the United States Code.

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Finally Plaintiffs allege that the developing of film for a publisher is merely an intermediate step in the publishing of which Defendant is aware.3/

Plaintiffs seek a declaration that application of such obscenity laws to a film developer's returning developed film to a publisher-owner thereof violates the First, and Fourteenth

^{2/} For purposes of determining whether a private party is subject to prohibitions of the Amendments to the Constitution. "state action" includes both federal action and action by one of the several states (Simkins v. Moses H. Cone Memorial Rospital, 323 F.2d 959,967 (4th Cir. 1963)), but might technically better be described generically as "governmental action" (footnote 5, Jackson v. Statler Foundation, 496 F.2d 623,627 (2nd Cir. 1974)).

Defendant's Notice of Motion and Memorandum of Points and Authorities are consecutively numbered and shall hereinafter be referred to as moving papers or "Mov.Pap." The Introduction thereof commencing on Page 18 asserts that the Complaint refers to Defendant's "policy and practice of refusing to return to customers sexually explicit pictures discovered during routine film developing operations performed in completing the customer's order when Kodak believes that returning such pictures might subject Kodak and/or its employees to the risk of criminal prosecution for violating federal and state obscenity laws." (Mov.Pap. 18:10.) The words "sexually explicit" appear only in the Fourth Cause of Action and the remaining emphasized portions above do not appear in any of the causes of action. The inaccuracy of Defendant's assertions is demonstrated by the fact that the same is unsupported by reference to portions of the Complaint contrary to the remaining assertions in the Introduction to Mov. Pap. which do refer to the applicable portions of the Complaint.

Amendments guarantying freedom of speech and press and prohibiting prior restraints.

The First Cause of Action of the Complaint contains the cause of action based upon violatons of the antitrust laws; the Second Cause of Action contains the claim of violation of 42 U.S. 1983 and the Fourteenth Amendment based upon the governmental actions of enacting legislation by virtue of which Defendant's practice was (by Defendant's own contention) adopted by the granting state trademark registrations; the Third Cause of Action contains the claim of violation of the First and Fifth Amendments based upon the enactment of federal laws by virtue of which Defendant's practice was (again by Defendant's own contention) adopted and by the granting of the patents and trademarks issued by the federal government. The Fourth Cause of Action contains the claims for declaratory relief.

B. Response to Defendant's Assertion of Relevant Facts.

It is interesting to note that there is not one word within the moving papers that in any way describes the transparencies (commonly known as color slides) which Defendant has withheld. Defendant suggests that it doesn't know of any pictures being withheld from Plaintiff. (For example, Def.Br. 22:3 and supporting sworn statements referred to there.)

Defendant refrains from directly asserting that there are no such pictures because in the State court action, to which the Defendant's Brief refers (footnote on page 30 thereof) a list identifying some of Plaintiffs' transparencies withheld by Defendant is attached as Exhibit "1" to the First Amended

Complaint. Not only is there an absence of any affidavit by Defendant that such pictures do not exist or that they do not belong to one or the other of the Plaintiffs, but rather there are opposing declarations that specifically state that such transparencies do belong to the Plaintiffs (see paragraphs 50-53 of Al Faer's opposing declarations).

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Plaintiffs do not believe that the contents of such transparencies is relevant in this litigation much less in this motion. As demonstrated in paragraphs 18 and 20 of Al Paer's opposing declaration, no one can say what the film never even presented to Kodak (because of Rodak's confiscation practice) would have shown; as to the transparencies Kodak has confiscated no one can say how such transparencies would have been cropped or published by Plaintiffs; no one can say which of the transparencies would have been used at all; no one can say what the overall content of such publication would have been even if the transparencies were used in their entirety. Nonetheless, assuming, without conceding, that the content of such transparencies constituting an interim stage in the creation of a magazine was in any way relevant, Defendant is the only one who knows that content. Yet Defendant has not presented such information to the Court, but instead by footnote (Def.Br. page 48) without any supporting foundation in any sworn statement refers to an attachment which contains copies of other publications by the Plaintiffs which obviously do not include the transparencies which Defendant has withheld. Plaintiffs believe that not only is the Defendant aware of the fact that it has withheld the transparencies

referred to on Exhibit "1" to the First Amended Complaint on file in the State action, but moreover, even its counsel is aware of such fact and the content of some, if not all, of those transparencies. We challenge Defendant or its counsel to deny the foregoing.

Defendant's Brief (22:18) next asserts that "Rodak does not return pictures to customers" meeting certain descriptions. One crucial point in this case is the subtle distinction between the true facts and this statement. So far as the pleadings and sworn statements on file herein show, "Rodak does not return pictures to customers" which Kodak determines to meet within certain descriptions. That is the problem. It is Rodak who has set itself up as censor.

For purposes of this motion, Plaintiffs do not dispute their knowledge of Defendant's practice (Def.Br. 24:4) prior to the submission of their films. Plaintiffs urge, however, that a genuine issue of fact exists as to whether or not such practice and notice thereof were in any sense binding on Plaintiffs, whether such notice can create a valid waiver as an implied-contractual provision and whether Plaintiffs constitutional right of free speech and press can be waived. These points are discussed at length in Section IV below.

Defendant next (Def.Br. 24:10) asserts that there are available alternatives to its processing of film. The answer to this contention is twofold. First, each of the opposing sworn statements disputes this fact and therefore raise a trible issue of fact. Secondly, as elaborated upon in Section III.B. below, such available alternatives is not pertinent to

the issue of Kodak's responsibility for its confiscation.

Defendant's contention (Def.Br. 25:4) that it is not acting pursuant to or under compulsion of the California and federal laws is contradicted by proposed finding of fact No. 7 which recites that the practice was adopted "for the purpose of avoiding the injury and expense that would result if Kodák and/or its employees were accused of violating the obscenity laws", by paragraph 7 of Norman D. McClaskey's supporting declaration and by the following portions of Defendant's Brief: 22:13-17, 23:12-24:2, 25:4-22, 29:6-12, 49:24-50:7, 54:15-20, 61:18-62:23 and 67:15-21. This subject is treated at length in Section VI below.

C. <u>Overview of Validity of Defendant's Motion</u>. The validity of Defendant's claims herein is perhaps best demonstrated by the positions argued so vehemently by Defendant. Defendant by sworn statements and discussion argues at length that it has the right as a private party to adopt whatever practice it wishes 4 and that in any event its withholding is not the subject for inquiry in a federal court. 5 If Kodak were truly secure in its contention that it may proceed however it sees fit with the film presented to it, why does it 30 to such great lengths in its moving papers

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^{4/} Def.Br. 23:1-6, 26:8-9, 30:11-17, 31:1-16, 49:26-50:7, 50:9-52:4.

^{5/} Def.Br. 27:1-5, 27:17-23, 28:2-15, 28:26-29:12, 29:14-30:9, 30:20-28, 37:6-18, 37:20-25, 39:22-45:11, 45:12-48:8, 55:6-61:13, 65:1-69:21.

to attempt to justify its conduct by reference to the nature of its policies. $\frac{6}{}$

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II

SUMMARY JUDGMENT RULES

- A. Moving Party Must Show No Genuine Issue As Matter Of
 Law. Summary judgment may only be granted when no
 genuine issues of fact exist and the moving party is clearly
 entitled to prevail as a matter of law. Real v. Driscoll
 Strawberry Associates Inc. 603 F.2d 748 (9th Cir. 1979); May
 Department Store v. Graphic Process Company No. 78-1228, 9th
 Cir., filed May 27, 1980, 80 Daily Journal D.A.R. 1669. Any
 doubts or disputes about factual issues must be resolved
 against the moving party. Arney v. United States 479 F.2d 653
 (9th Cir. 1973).
- B. Summary Judgment Should Not Be Granted Prior To Full Discovery. Furthermore, summary judgment should not be granted until such time as the party opposing the motion has had an adequate opportunity to conduct discovery. The foregoing rule is particularly true in situations where the facts necessary to oppose the motion are in the possession of the moving party. The above rules have been codified in Rule 56(f) of the Federal Rules of Civil Procedure. See also

^{6/} Def.Br. 22:13-24:8, 25:4-22, 28:15-24, 29:23-27, 43:24-44:7, 49:24-26, 50:6-11, 54:13-55:14, 61:15-62:23, 69:23-70:35.

Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S.

738, 96 S.Ct. 1848, 48 L.Ed 2d 338 (1976); Poller v. Columbia

Broadcasting System 368 U.S. 464, 82 S.Ct. 486 7 L.Ed. 2d 458

(1962); Timberlane Lumber Co. v. Bank of America 549 F.2d 597

(9th Cir. 1976); Illinois State Employees Union Council 34 v.

Lewis 473 F.2d 561, 565 n.8 (7th Cir. 1972).

Hospital Building, involved a reversal of lower court's summary dismissal of a complaint prior to plaintiffs having had an adequate opportunity to conduct discovery. The Court stated:

"And in antitrust cases, where 'the proof is largely in the hands of alleged conspirators' [citation] dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly. Applying this concededly rigorous standard, we conclude that the instant case is not one in which dismissal should have been granted. Petitioner's complaint states a claim upon which relief can be granted under the Sherman Act." 425 U.S. at 746-747.

Defendant's motion herein was made within a few days after counsel for the parties first met to discuss discovery and before any discovery had been taken. Here the Defendant's motivation for its confiscatory practice and policy and its alleged antitrust activities are in Kodak's possession. Thus, Defendant's motion is premature, and should therefore be denied.

C. Summary Judgment Inappropriate In Antitrust Cases.
Summary disposition of factual issues is generally

inappropriate in antitrust cases since these cases involve complex factual issues and often turn on questions of motive and intent. Poller v. Columbia Broadcasting System 368 U.S. 464, 82 S.Ct. 486, (1962); Fortner Enterprises, Inc. v. United States Steel Corp. 394 U.S. 495, 89 S.Ct. 1252 (1969); Javelin Corp. v. Uniroval, Inc. 546 F.2d 276 (9th Cir. 1976); Blair Foods, Inc. v. Ranchers Cotton Oil 610 F.2d 665 (9th Cir. 1980).

Poller presented a factual situation somewhat similar to that involved in the present case. Plaintiff sued defendants for violations of Sections 1 and 2 of the Sherman Act. The District Court granted defendants' motion for summary judgment and the Court of Appeals affirmed. The Supreme Court reversed. In moving for summary judgment, the defendant relied primarily on the affidavits of two individuals who were employed by a defendant, of a third individual who was a co-defendant and of a fourth individual who made a substantial profit from the disputed transactions. In disapproving the grant of summary judgment, the Court stated:

"The respondents in their motion for summary judgment depended upon the affidavits of four persons. It is readily apparent that each of these persons was an interested party." (Emphasis added.) 368 U.S. at 468.

The Court further reasoned:

"We look at the record on summary judgment in the light most favorable to Poller, the party opposing the motion, and conclude here that it should not

have been granted. We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. [Footnote omitted.] It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice'". 368 U.S. at 472-473.

In the present case, Defendant has raised numerous factual questions in its Brief and has requested the Court to render judgment purely in reliance on the affidavits of various employees of Defendant. Additionally, as shall be discussed, Defendant's liability for conduct in restraint of trade under Section 1 of the Sherman Act or for monopolization or for an attempt to monopolize will turn on the resolution of various factual questions involving Defendant's motive and intent in procuring its monopoly and whether its conduct had anti-competitive purposes or effects.

III

THE LAW ABHORS PRIOR RESTRAINT

Defendant's policy of confiscation directly affects and

threatens Plaintiffs' freedom of speech and press by precluding its expression. This constitutes a prior restraint of speech.

"Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." Bantam Books, Inc.

v. Sullivan, 372 U.S. 58,70 83 S.Ct. 631,639

(1963) later quoted in New York Times Company v.

U.S., 403 U.S. 713,714, 91 S.Ct. 2140,2141 (1971).

The Supreme Court in Southeastern Promotions Ltd. v.

Conrad, 420 U.S. 546,553-554 95 S.Ct. 1239,1244 (1975) stated
as follows:

*Our distaste for censorship-reflecting the natural distaste of a free people--is deep--written in our law.

"In Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940), a unanimous Court held invalid an act which proscribed the solicitation of money or any valuable thing for 'any alleged religious, charitable or philanthropic cause' unless that cause was approved by the secretary of the public welfare council. The elements of the prior restraint were clearly set forth:

'It will be noted, however, that the Act requires an application to the secretary of the public welfare council of the State; that he is empowered to determine whether the cause is a religious one, and that the issue of a certificate depends upon

If the statutes are applied as contended by Kodak and therefore Rodak confiscates films under alleged compulsion of state and federal law, then the same evil which was struck down in Cantwell is present here. Plaintiffs' freedom of speech is subjected to "appraisal of facts, the exercise of judgment, and the formation of an opinion" by Rodak. 2

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"The presumption against prior restraints is heavier -- and the degree of protection broader -- than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual

^{7/} Plaintiffs are aware that Defendant is not subject to constitutional proscriptions unless its conduct amounts to "state" action. In this and later sections of this Memorandum. we detail at length why Kodak's conduct amounts to governmental action.

will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546,558-559 95 S.Ct. 1239, 1246-1247 (1975).

Paragraphs 19 and 19 of Al Faer's opposing declaration point out that which portion of which transparencies will be published and in what manner is not known at the time the transparencies are in Kodak's hands. Therefore not only is it "difficult to know in advance what" Plaintiffs will say or depict, its impossible.

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In Near v. State of Minnesota, 283 U.S. 697,721, 51

S.Ct. 625,633 (1931) the Supreme Court struck down a statute
"authorizing suppression" of materials thereby preventing free
speech and press. Here Rodak suppresses transparencies. The
Court there stated that it was irrelevant whether the restraint
be by the legislature or "administrative officer."

In <u>Near</u> the asserted justification for the prior restraint was the injury suffered from libelous publications. In this case the alleged injury is the publication of obscenity. Substituting obscenity for libel, the rule to be drawn from <u>Near</u> is (bracketed portions representing such substitutions):

"The recognition of authority to impose previous restraint upon publication in order to protect the

community against the circulation of [obscene matter] necessarily would carry with it the admission of the authority of the consor against which the constitutional barrier was erected. The preliminary freedom, by virtue of the very reason for its existence, does not depend, as this court has said, on proof of [non-obscenity]. [citation.] "Equally unavailing is the insistence that the statute is designed to prevent the circulation of [obscenity] which [is undesireable]. The theory of the constitutional guarantee is that even a more serious public evil would be caused by authorities to prevent publication."

Nor may reference be made to prior publications of

Plaintiffs. A restraint which "operates to suppress, on the

basis of previous publications" is unconstitutional.

Organization For A Setter Austin v. Keefe, 402 U.S. 415,418, 91

S.Ct. 1575,1577 (1971). (Emphasis added)

The rule of Near applies in the case of disputes between private parties as it does in disputes between the government and a private party (Organization For A Better Austin v. Keefe, 402 U.S. 415,418, 91 S.Ct. 1575,1577 (1971) and Goldblum v. National Broadcasting Company, 584 F.2nd 905,907 (9th Cir. 1979)) and freedom of speech and press applies to commercial as well as non-commercial speech (New York Times Company v. Sullivan, 376 U.S. 254,256, 84 S.Ct. 710,713 (1964) and Quinn v. Aetna Life & Cas. Co., 616 F.2d 38

(2nd Cir. 1980)).

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While the governmental action involved in the foregoing cases included injunctive relief from the court, the initial governmental involvement in Near was the statute whose application was declared unconstitutional.
8 So too in this case the underlying federal and state action arises from the two statutes involved.

Defendant states that "[b]ecause of Federal and State laws relating to pornography... [f]ilm sent to Kodak for processing which depicts [certain described subject matter] will not be returned ... " (Exhibit "A" to Norman D. McClaskey; supporting affidavit.) The film sent to Defendant by or for Plaintiffs is merely an early intermediate step in the process of Plaintiffs' publishing their magazines. (Paragraphs 10-24 of Al Faer's opposing declaration and paragraph 23 of Reynolds Allinger's supporting declaration.) Defendant's threatened and actual confiscation of film directly intereferes with the Plaintiffs' editorial process and freedom of press by denying Plaintiffs films which they might use and therefore requires their use of other transparencies and inferior quality. In effect Defendant under its alleged compulsion of law has entered the composing room of Plaintiffs to give directives as to the content of expression by Plaintiffs. On the alleged

^{8/ &}quot;'[T]he freedom of press requires that it should be exempt not only from previous restraint by the Executive, as in Great Britain, but from legislative restraint also.'" Near v. State of Minnesota, 283 U.S. 697,714 51 S.Ct. 625,630 (1931)

basis of federal and state laws, Defendant has therefore created its own prior restraint upon Plaintiffs' speech. The law with respect to such activity is well-stated in the recent case of Goldblum v. National Broadcasting Corp., 584 F.2d 905.907 (9th Cir. 1979):

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"It is a fundamental principle of the first amendment that the press may not be required to justify or defend what it prints or says until after the expression has taken place. The Government has been prohibited from interfering with the editorial process by entering the composing room to give directives as to the content of expression. The district court proceedings here intervened in the editorial process by ordering an official of the broadcasting company to produce a film just before its scheduled broadcast so that it could be examined for inaccuracies. A procedure thus aimed toward prepublication censorship is an inherent threat to expression, one that chills speech."

(Emphasis added and citations omitted.)

In <u>Goldblum</u> the challenged order did not prevent or preclude publication. Rather it merely required divulgence to the court before publication. Nonetheless the order was reversed (within twenty-four hours). How much worse is Defendant's position here when its practice has resulted not only in chilling free speech but also in actual prevention of publication of the materials it has undertaken to censor.

"The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the Pirst Amendment." <u>Pittsburgh</u>

Press Co v. Pittsburgh Com'n on Human Rel, 413
U.S. 376,390, 93 S.Ct. 2553, 2561 (1973).

Because of its own alleged interpretation of the statutes, Defendant exercises "excessive caution" resulting in Plaintiffs loss of their freedom of speech.

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 In <u>Baggett v. Bullitt</u>, 377 U.S. 360,372,84 S.Ct.

1313,1323 (1964 the Supreme Court struck down a statute creating a prior restraint because it forced "[t]hose . . . sensitive to the perils posed by [the statute to] avoid the risk . . . by restricting their conduct to that which is unquestionable safe. Free speech may not be so inhibited."

A. Illegal Content Of Films Would Not Justify Prior

Restraint. The case of Southeastern Promotions, Ltd.

v. Conrad, 420 U.S. 546, 95 S.Ct. 1239 (1975) is particularly instructive. In that case the Plaintiff was denied the right to use public property to put on a live performance of a musical play. The lower court found the play to be obscene. The Plaintiff raised three arguments: (1) that the Defendant's refusal was an unlawful prior restraint, (2) that the wrong test of obscenity was applied and (3) that the record did not support the finding of obscenity. The Supreme Court responded

in part:

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"We do not reach the latter two contentions, for we agree with the first." 420 U.S. at 552, 95 S.Ct. at 1243.

The significance of the foregoing is that the Court declared the Defendant's conduct unconstitutional regardless of whether the play was obscene. Once a prior restraint was found, the nature of the speech became insignificant.

Thus, the nature of the transparencies here too should be deemed irrelevant. What the State cannot do directly it cannot do through the back door. If, as Kodak contends, it faces a risk of prosecution, then the statute which directs Kodak to engage in prior restraint must be declared unconstitutional in its application to a film developer, and Kodak's practices done to aid such prior restraint must be enjoined.

B. Available Alternative Means of Publication Will Not Save A Prior Restraint. The sworn statements submitted by both parties and Defendant's Brief in large measure (eg. Def.Br. 24:10 to 25:2) devote their attention to whether or not alternatives are available to Plaintiffs. While that fact has some bearing upon the nature and extent of the award Plaintiffs, upon prevailing, should receive, it truly has little to do with the issue of liability or the granting of a summary judgment. The statement by the Court in Southeastern Promotions, supra, is particularly appropriate here:

"Whether petitioner might have used some other,

privately owned, theater in the city for the production is of no consequence. There is reason to doubt on this record whether any other facility would have served as well as these, since none apparently had the seating capacity, acoustical features, stage equipment, and electrical service that the show required. Even if a privately owned forum had been available, that fact alone would not justify an otherwise impermissible prior restraint. '[0]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.' Schneider v. State 308 U.S., at 153, 60 S.Ct., at 151." 120 U.S. at 556, 95 S.Ct. at 1239.

If appropriate alternative theaters could not save the prior restraint in <u>Southeastern Promotion</u>, then alternative laboratories pannet save Kodak's prior restraint.

IV

PLAINTIFFS ARE NOT BOUND BY THE TERMS OF THE PURPORTED NOTICE

At pages 30-31 of its brief, defendant argues that it is not obligated to return material depicting matters described in its notice because that notice constituted part of a contract between defendant and plaintiffs.

A. Plaintiffs Did Not Contractually Agree To Kodak's

Confiscation Policy. Paragraph 21 of Robert

DeMarco's opposing affidavit states quite clearly that

Plaintiffs never agreed to Defendant's confiscation policy. At
a minimum, this raises a genuine issue of fact.

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Kodak contends that Plaintiffs are bound by Exhibit "B" to Norman McClaskey's supporting affidavit which purports to be the general terms and conditions under which Kodak accepts material for processing. There is no sworn statement even suggesting that Exhibit "B" was ever presented to or known by Plaintiffs.

B. There Is No Waiver From Kodak's Unilateral Notice.

"[Waiver] is a voluntary act and implies an abindonment of a right or privilege—an election to dispense with something of value or to forego some advantage which one might, at his option, have demanded. In no case will a waiver be presumed or implied contrary to the intention of the party whose rights would be injuriously affected thereby, unless by his conduct the opposite party has been misled, to his prejudice, into the honest belief that such waiver was intended or consented to."

Chase v. National Indemnity Co., 129 Cal.App.2d 853,858 (1954).

C. Even If Notice Otherwise Were Deemed A Waiver, As

Contract of Adhesion It Is Not Enforceable. There is
a genuine issue of fact as to whether or not the notice could

be enforced even if it constituted a waiver.

Second, assuming the existence of a written contract, the contract is one of adhesion.

Even unambiguous provisions of a contract of adhesion will not be strictly enforced if they result in unreasonable, unjust, or unconscionable forfeitures or absurd results. See Schilk v. Benefit Trust Life Insurance Co., 273 Cal.App.2d 302, (1969); Steven v. Fidelity and Casualty Co., 58 Cal.2d 862, (1962); Cal Civ. Code, \$1670.5.

The basic criteria for determining whether a contract is an adhesion contract include:

- (i) a contract presented in a standardize form;
- (ii) prepared by the party with superior bargaining power;
- (iii) due to such disparity and bargaining power the contract must be accepted or rejected on a "take-it-or-leave-it" basis by the weaker party;
 - (iv) there is no realistic opportunity to bargain over terms; and
- preparing the contract has a monopoly (natural or artificial) in the desired goods or services.

 See Blair v. Pitchess, 5 Cal.3d 258,275-276 (1971); Adams v. Egley, 338 F. Supp. 614,620 (S.D.Cal. 1972); Wheeler v. St. Joseph's Hospital, 63 Cal.App.3d 345,356 (1977).

All the elements of an adhesion contract are present in this case. Kodak presents its terms and conditions for accepting material for processing in a standardized printed

form which has been prepared by it. Kodak clearly is in a superior bargaining position to that of Plaintiffs or at least this is a genuine issue of fact. As Kodak itself contends, it will not accept material for processing unless customers comply with its terms. Kodak's overwhelming position in the market for superior quality photofinishing and whether plaintiffs must utilize the services of Kodak is clearly in dispute.

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 As an adhesion contract, the contract between Kodak and plaintiffs would be subject to construction by the court. All ambiguities or questions pertaining to the impact and effect of various clauses would be construed against Kodak.

D. First Amendment Rights Are Not Waiveable. First

Amendment Rights such as Freedom of Speech are interests of society as a whole and cannot be waived. Abington School District v. Shempp, 374 U.S. 203,224-5 83 S.Ct. 1560 (1963); Johnson v. Sanders, 319 F.Supp. 421, (D.C.Conn. 1970), aff'd 403 U.S. 955, 51 S.Ct. 2292. Thus, even an explicit attempt to waive First Amendment Rights would be ineffective.

Even as to non-First Amendment Rights, every reasonable presumption against waiver of fundamental constitutional rights must be made and such rights cannot be waived in a contract of adhesion. Fuentes v. Shevin, 407 U.S. 67,95, 92 S.Ct. 1983,2001-2002 (1972), Adams v. Egley, 338 F.Supp. 614,620 (S.D.Cal. 1972) and Blair v. Pitchess, 5 Cal.3d 258,274-276 (1971).

Thus, in <u>Fuentes</u>, <u>supra</u>, the Supreme Court declared that the Florida and Pennsylvania pre-judgment replevin statutes were unconstitutional even though the debtor had

agreed in writing that the seller could take back the merchandise in the event of default.

Moreover, the foregoing cases require clear waiver of constitutional rights. There is clearly no language within the Kodak notice by which Plaintiffs purport to waive their constitutional rights. Plaintiffs received nothing additional from Kodak in consideration of the purported waiver of these rights. Additionally, the question of whether the material tendered by plaintiffs to Kodak for processing falls within the ambit of the material identified in Kodak's notice is still an open one.

E. Conclusion Regarding Notice. For each of the foregoing reasons, there are genuine issues of fact as to whether or not Kodak's notice could or did constitute a waiver of constitutional or other rights Plaintiffs had to their property and to publish the transparencies which Kodak has confiscated.

V

PLAINTIFFS HAVE STATED CLAIMS UNDER THE ANTITRUST LAWS AND HAVE STANDING TO COMPLAIN OF DEFENDANT'S VIGLATIONS OF THESE LAWS AND THERE ARE GENUINE ISSUES OF FACT RESPECTING SAME

A. <u>INTRODUCTION TO ANTITRUST</u>. Defendant attacks the sufficiency of Plaintiffs' allegations for relief under the antitrust laws. All hough entitled a "Motion for Summary Judgment", much of Defendant's argument is in the

nature of a motion to dismiss for failure to state a claim upon which relief can be granted. As such, it should be denied since pleadings must be liberally construed so as not to unnecessarily defeat antitrust actions. Hospital Building Co. v. Trustees of Rex Hospital 425 U.S. 738,746 96 S.Ct. 1848,1853 (1976) and Boddicker v. Arizona State Rental Ass'n 549 F.2d 626,632 (9th Cir. 1977). Furthermore, a short and concise statement of a claim putting defendant on notice of the nature of plaintiffs' claims is all that is required. Fed. R. Civ. P. 58.

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Defendant's contentions that Plaintiffs' lack standing to sue, that Plaintiffs fall outside a target area, and that Defendant's withholding of sexually explicit material tends to increase competition in the photofinishing market are grounded on misconceptions of the nature of Plaintiffs' claims.

Additionally Defendant's seeking dismissal of the Complaint rests merely on the strength of insufficient and contradicted sworn statements of Defendant's employees.

Before addressing each of Defendant's arguments, we briefly describe some of Plaintiffs' antitrust claims. First Plaintiffs, as customers of Kodak, seek damages and injunctive relief under Sections 4 and 16 of the Clayton Antitrust Act, 15 U.S.C. §\$15,26 (1980) for injuries caused by defendant's monopolization of the market for superior quality photofinishing in violation of Section 2 of the Sherman Antitrust Act, 15 U.S.C. §2 (1980). Second, Plaintiffs, as customers of Kodak, seek damages and injunctive relief under these same sections of the Clayton Act for injuries caused by

defendant's attempt to monopolize the same market in violation of Section 2 of the Sherman Act. Third, Plaintiffs seek damages and injunctive relief under Sections 4 and 16 of the Clayton Act for injuries caused by Defendant's unlawful misuse of its monopoly or economic power to disrupt markets in which plaintiffs compete -- including misuse of monopoly or economic power attributable to patents owned by Defendant.

These claims of antitrust behavior do not rest solely upon or stem from Modak's confiscation of transparencies.

Defendant's arguments all proceed from the misconception that the opposite is true.

B. Plaintiff's Complaint States a Violation of Section 1
of the Sherman Act and Multiplicity of Actors not

Required. Defendant (Def.Br. 31:18 et.seq.) argues that a
violation of Section 1 of the Sherman Antitrust Act 15 U.S.C.
51, requires at least two persons acting in concert and that
the Complaint herein states no violation of Sherman Act \$1
because plaintiffs have alleged illegal activities solely on
the part of Rodak. Defendant further argues that corporate
officers and/or employees may not conspire with a corporation
for purposes of Section 1 of the Sherman Act.

Kodak cites no authority for the proposition that a violation of Section 1 of the Sherman Act requires a multiplicity of actors. The cases cited on page 32 of Defendant's Brief merely state that concerted action by a corporation and its officers and/or employees does not generally constitute a "contract, combination or conspiracy within the meaning of Section 1 of the Sherman Act." That does

not mean that Plaintiffs must allege a multiplicity of actors. Rather, the law is that for purposes of finding a violation of Sherman Act \$1 the requisite contract, combination, or conspiracy in restraint of trade can be found merely from the relationship between a single plaintiff and a single defendant. Albrecht v. Herald Co., 390 U.S. 145, 88 S.Ct. 869 (1968); Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 88 S.Ct. 1981 (1968); and United States v. Parke, Davis and Company, 362 U.S. 29, 80 S.Ct. 503 (1960).

Albrecht involved a treble damage action by a newspaper distributor against defendant newspaper for resale price maintenance in violation of Section 1 of the Sherman Act. In reversing the lower court's judgment for the defendant, the Supreme Court made the following comments:

"Petitioner's original complaint broadly asserted an illegal combination under \$1 of the Sherman Act. Under <u>Parke</u>, <u>Davis</u> petitioner could have claimed a combination between respondent and himself, at least as of the day he unwillingly complied with respondent's advertised price." 390 U.S. at 150, n.6.

In <u>Perma Life Mufflers</u>, supra, 392 U.S. at 142, 88

S.Ct. at 1986 the Court stated: "In any event each petitioner can clearly charge a combination between Midas and himself, as of the day he unwillingly complied with the restrictive franchise agreements."

Furthermore in United States v. Eastman Kodak, 226 Fed.

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" Section 1 of the Sherman Act specifies restraint of trade by contracts, combinations, or conspiracies, while section 2 specifies monopolization or attempted monopolization, of any part of the trade or commerce among the states of combinations or conspiracies. In its lucid construction of this statute the Supreme Court in the Standard Oil Case [221 U.S.1, 31 S.Ct. 502 (1911)] included equally restraint of trade or monopoly, either by a corporation or combination of corporations, or by an individual or combination of individuals, as falling within the prohibition; and what " ' ... [H]aving by the first section forbidden all means of monopolizing trade, that is, unduly restraining it by means of every contract, combination, etc., the second section seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is, restraints of trade, by any attempt to monopolize or monopolization thereof, even although the acts by which such results are attempted to be brought about or are brought about be not embraced within the general enumeration of the first section.'" (Emphasis added.) 226 Fed. at 65-66.

Finally as a separate matter ignored in Defendant's Brief, the effect of Kodak's confiscation policy is to restrain trade by placing Plaintiffs' in a reduced competitive position in magazine sales either through poorer product or increased costs or both or by forcing Plaintiffs to publish magazines which Kodak wants published rather than what Plaintiffs want published.

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Anti-competitive conduct giving rise to a claim for relief under Section 1 of the Sherman Act, 15 U.S.C. \$1, can be found in situations where the defendant has affected competition between third parties., United States v. Arnold, Schwinn & Co., 388 U.S. 365, 87 S.Ct. 1856 (1967) [manufacturer held guilty of imposing territorial restraints on resales by dealers and distributors]; United States v. Parke, Davis and Co., 362 U.S. 29, 80 S.Ct. 503 (1960) [manufacturer held guilty for imposing restrictions on prices charged by customer on resale of goods]; Harold Friedman, Inc. v. Thorofare Markets, 587 F.2d 127 (3rd Cir. 1978) [reversing grant of summary judgment and holding that tenant may be liable for anti-competitive effect of restrictive covenant in shopping center lease preventing landlord's leasing to competitor]; Dart Drug v. Peoples Drug, 1977-1 Trade Cases (CCH) \$61,281 (D.C.D.C.) [under similar facts to Friedman, supra, landlord's motion to dismiss for failure to state a claim denied]; Grand Caillou Packing Company, Inc., 65 F.T.C. (1964), endorsed in part sub.nom., LaPeyre V. F.T.C., 366 F.2d 117 (5th Cir. 1966) [licensor's discrimination in patent licensing fees charged competitors held unfair trade practice].

C. Plaintiff's Complaint States A Cause Of Action For Relief Under Section 2 Of The Sherman Act Flowing From Defendants Monopolization Of The Market For Superior Quality Photofinishing. At pages 33 to 54 of Defendant's Brief, Kodak argues that Plaintiffs do not have a claim for relief under Section 2 of the Sherman Act. In support of this contention, Defendant in part argues that its refusal to return sexually explicit material results in a hightening of competition in the photofinishing market (Pages 43-45 of

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Def.Br.).

Kodak misapprehends the nature of Plaintiff's claims. As noted in 5V.A. above, Plaintiffs need not plead all evidentiary facts entitling them to relief - it is merely sufficient to put defendant on notice of the nature of plaintiff's claims, i.e. violations of Sections 1 and 2 of the Sherman Act. Plaintiffs do not contend that defendant's refusal to return sexually explicit material is evidence of Defendant's monopolization of the market for superior quality photofinishing. Plaintiffs claim that Rodak has monopolized the superior quality photofinishing market in violation of Section 2 of the Sherman Act, and, as customers of Kodak, utilizing the monopolized services, Plaintiffs have been injured in their business or property and thus have standing to complain under Section 4 of Clayton Act (15 U.S.C. §15). There is no question that, as customers of Kodak, Plaintiffs have standing to complain of its unlawful monopolization of the superior quality photofinishing market. Reiter v. Sonotone Corp. 442 U.S. 330, 99 S.Ct. 2326, 60 L.Ed. 931 (1979).

 Plaintiffs Have Alleged Kodak's Monopoly Power In Superior Quality Photofinishing For Commercial

Use. Referring solely to two lines of Paragraph 4 of the Complaint Defendant argues that "Plaintiffs have only alleged . . . that Kodak 'has monopolized and attempted to monopolize interstate trade and commerce in film developing.'" For some unexplained reason Defendant's Brief here omits mention of Paragraphs 5 and 6 of the Complaint which clearly allege the monopoly power Defendant denies at Def.Br. 33:4. Those paragraphs are set out in footnote 9.

2. <u>Defendant's Definition Of Monopolization Is</u>

<u>Misleading</u>. At page 34 of its Brief, Kodak cites
cases purportedly defining monopoly as "(1) Defendants
possession of monopoly power in the relevant market; and (2)
defendants willful acquisition or maintenance of that monopoly

[&]quot;5. Pursuant to and in furtherance of the aforesaid monopolization and attempt to monopolize, Defendant has pursued service, distribution and marketing policies that have prevented competing photofinishers from having an adequate opportunity to effectivily compete for business in the market for superior quality developing of film. Defendant has achieved, and attempted to achieve, its monopolization of the photofinishing business by the advantageous use of its significant power in other areas of the film industry. Kodak has thereby limited the ability of other photofinishers to compete with Defendant's photofinishing process in terms of quality and market share, and has attained a position of dominance in the field of commercial color picture photofinishing and developing.

[&]quot;6. As a result of the aforementioned violations,
Defendant has achieved and maintained a monopoly in
the market for superior quality photofinishing. The result of
this monopoly is that those who require superior quality in the
developing of film must use the services of Defendant."

power as distinguished from growth or development as a consequence of superior product or of superior business acumen."

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This statement is in error in that it only defines one set of circumstances under which monopolization in violation of Section 2 of the Sherman Act has been found.

As to monopoly power the courts have promulgated three broad tests for determining the existance or absence of monopoly power: (1) Actual use of power to raise prices or exclude competition, (Pacific Coast Agricultural Export Ass'n v. Sunkist Growers Inc., 526 F.2d 1196,1204 (9th Cir. 1975), cert. denied, 425 U.S. 959 (1976); and American Tobacco v. United States 221 U.S. 106, 31 S.Ct. 632, (1911)); (2) Relative size - that is, the percentage of market supply controlled (United States v. Grinnell Corp., 374 U.S. 563,571 86 S.Ct. 1693 (1966) and United States v. E.I. DuPont de Nemours & Co. 351 US 377,391 76 S.Ct. 994, (1956)); and (3) An analysis of market structure and of the business policies, conduct and performance of the defendant (United States v. Columbia Steel, 334 U.S. 495, 68 S.Ct. 1107 (1948)).

With respect to the question of defendant's state of mind, the courts have inferred the intent required to establish actual monopolization in at least three different groups of cases: (1) where the defendant has obtained its position of-monopoly power by means of unlawful or predatory acts; (United States v. Grinnell Corp., 384 U.S. 574, 86 S.Ct. 1706 (1966); and Standard Oil Company v. United States, 221 U.S. 1, 31 S.Ct. 502 (1911)); (2) where the defendant has acquired monopoly power legally and fairly, by research, business skill, or

normal competitive activity, but where such power has been maintained or expanded by means, abusive, coercive, or unfair practices (United States v. United Shoe Machinery Corp., 110 F.Supp. 295, 342 (D.Mass. 1953), aff'd per curiam, 347 U.S. 521, 74 S.Ct. 699 (1954)); and (3) where the defendant has achieved monopoly power lawfully and fairly, as in (2), but where such power has been willfully or consciously acquired or maintained by the defendant's business policies rather than as a result of a superior product, business acumen, research, natural advantages, or normal competitive growth (United States v. Grinnell Corp., 384 U.S. 563,570-71 86 S.Ct. 1698, (1966)).

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As stated in 16 Von Kalinowski, Antitrust Laws and Trade Regulation 59:02(4) n. 107.

"[O]nce the plaintiff proves the existence of monopoly power in a relevant market, there is a rebuttable presumption that defendant has the requisite intent and purpose, and, therefore, that it has "monopolized" under Section 2 of the Sherman Act."

Commensing with two narrow a definition Defendant of course reaches the wrong conclusions.

3. <u>Defendant's Monopolization</u>. Defendant first attempts to establish an absence of monopolization by citing <u>Berkey Photo, Inc. v. Eastman Kodak</u>

Co., 603 F.2d 263 (2d Cir. 1979) as authority for the proposition that Kodak's market share was only 10% of the national photofinishing market. That case cannot be used

offensively by Kodak as collateral estoppel since Plaintiffs were not a party to that action. Additionally the opposing sworn statements demonstrate that the relevant market in this case is only a portion of the national photofinishing market.

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Defendant next refers to the supporting sworn statements. (Def.Br. 35:11) These supporting sworn statements, however, merely allege that various non-Kodak processing laboratories "are capable" of achieving the same quality of product as Rodak's own film processing laboratories. Curiously they nowhere state that these non-Kodak laboratories in fact provide or offer to provide photofinishing services of equal quality to those supplied by Kodak. In any event the opposing sworn statements 10 contradict the supporting sworn statements and raise a genuine issue of fact as to whether comparable substitutes are, in fact, available for the services rendered by Kodak.

The discusson and analysis at pages 392-404 of the decision in United States v. E.J. Dupont de NeMours & Co., 351 U.S. 377, 76 S.Ct. 994 (1956), demonstrates that the ability to substitute goods or services for other goods or services is impor int in defining a relevant market for purposes of Sherman Act §2 and is also important in analyzing the impact of a restraint on trade for purposes of Sherman Act \$1. Thus,

^{10/} Paragraphs 29-49.2 of Al Faer's opposing declaration, paragraphs 7-19 of Robert Elia'a opposing declaration, paragraphs 5-20 of Robert DeMarco's opposing declaration, and paragraphs 15 and 16 of Matti Klatt's opposing declaration.

defendant's mere recitation that there are a number of non-Kodak film processing laboratories and that some of these laboratories are capable of achieving the same quality of product as Kodak's own processing laboratories does not direct itself to Kodak's market power in the relevant market as measured by its percentage of sales in that market, or whether non-Kodak processing laboratories are in fact offering services of the same quality as those offered by Kodak's processing laboratories.

Defendant's assertion (Def.Br. 36:3) that in lieu of using Kodachrome, plaintiffs could achieve satisfactory results by using Ektachrome is rebutted by the opposing declarations (see footnote 10, above).

At a minimum Defendant's contentions demonstrate the need for discovery to establish the parameters of the relevant market prior to any summary judgment.

D. Plaintiffs Have Standing To Complain Of Defendant's

Violations Of The Antitrust Laws. Defendant develops
an elaborate (if not tortured) argument at pages 37 to 45 of
its Brief to the effect that even if Defendant did have a
monopoly position in a relevant market Plaintiffs have no
standing to claim damages because they are not within an
alleged "target area".

Defendant starts with treatise authority that there are six elements to determine standing. Of these the statement of two [(4) and (5)] are so inappropriately worded that they must in turn be defined in other terms. From this Defendant arrives at a shibboleth to determine whether a plaintiff has standing.

"target area". If a plaintiff is within the target area, then Defendant tells us that the plaintiff has standing, and if not, then the plaintiff does not have standing.

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Assuming, without conceding, the validity to such an approach, we are then forced to go one step beyond the shibboleth and use "a two-step analysis". (Def.Br. 41:4.) But even this is not the end of the Defendant's analytical tunnel. To the two-step analysis of the shibboleth, target area, distilled from a redefinition of two of the original six elements, Defendant adds a new element to "target area" (Def.Br. 41:13.) and introduces the test of "immediate" by virtue of what Defendant (without authority) claims to be "essentially" what the courts' inquiry is. (Def.Br. 42:1.)

We eschew debating the unsupported formula proposed by Defendant to determine standing. We hope to resolve the matter more directly. Assuming, without adopting, that Plaintiffs must be within the target area, Defendant cites no cause (because we believe none could be found) holding or even suggesting that a direct customer of one engaged in antitrust activities did not have standing to question those activities. It taxes credulity to suggest that a direct customer does not have standing or (if we were to convert to one of the other formalizations in Defendant's analysis) that there is not a "direct and casual nexus between the antitrust violation and [a customer's] injury". (Def.Br. 40:13.)

In Contreras v. Grower Shipper Vegetable Assocation of Central California, 1971 Trade Case (CCH) ¶ 73,592 (N.D.Cal. 1971), affd., 484 F.2d 1346 (9th Cir. 1973), cert. denied, 415

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U.S. 932, 94 S.Ct. 1445 (1974) (Def.Br. 42:4) the anti-competitive behavior involved a conspiracy to raise the price of lettuce while the plaintiffs were laborers rather than customers.

As noted at 43:1 of Defendant's Brief, the same is true in <u>Gutierrez v. E & J Gallo Winery Co., Inc.</u>, 604 F.2d 645 (9th Cir. 1979). Defendant's Brief fails to mention is the following appearing at page 646 of that decision:

"The portion of the judgment which denies relief to the plaintiffs Peter Turkier and Stephen White, who are referred to in the complaint as consumer plaintiffs, is vacated and their case is remanded to the district court for further proceedings in light of the decision in the supreme court in Reiter v. Sonotone Corp. [citation omitted]."

As described in Defendant's Brief (43:11) in In Re
Multi-District Vehicle Air Pollution M.D.L. No. 31, 481 F.2d

122, (9th Cir. 1973), the plaintiffs were farmers suing automobile manufacturers for their elimination of competition in research and development of automobile air pollution control equipment on the basis that air pollution damaged their crop production. Obviously they were not in the capacity of buyers or customers either.

Thus in none of the cases Defendant cites is there a holding that a direct customer is not in the target area.

The law, in fact, appears to be to the contrary. As noted in the quotation from <u>Gutierrez</u>, <u>supra</u>, the Supreme Court

in <u>Reiter v. Sonotone Corp.</u>, 442 U.S. 330,____, 99 S.Ct. 2326,2332 (1979) held that "consumers of retail goods and services have standing to sue under 5 4..."

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Commencing at 43:28 of Defendant's Brief, Defendant argues that:

"If plaintiffs were suing Kodak in this action for damages allegedly caused by such higher prices, they would allege a claim for relief. But plaintiffs make no such claim; instead, they evidence a willingness to pay Rodak's price and complain only of having been denied processing of sexually explicit film by Rodak with result in damage. In so doing, plaintiffs fail to bring themselves within the target area of the economy endangered by Kodak's alleged monopoly. "If plaintiff's allegations are taken as true, then Kodak's refusal to return to plaintiffs various sexually explicit pictures, rather than contributing to the breakdown to economic conditions within the target area, i.e., relevant market, actually generates added business for Rodak's competitors and thereby promotes competition."

First, the First Cause of Action of the Complaint contains no allegation that Plaintiffs are willing to pay Kodak's price. Secondly, it is not solely the extraction of an increased price that can be the evil of antitrust behavior for

which relief is given. Defendant suggests no authority that the antitrust laws are directed solely at price manipulation. In <u>United States v. Associated Press</u>, 52 F.Supp. 362 (S.D.N.Y. 1943), <u>affd.</u> sub. nom <u>Associated Press v. United States</u>, 326 U.S. 1, 65 S.Ct. 1416 (1945), the defendant's act complained of was a restriction in A.P.'s by-laws for the admission of members. The court held that the monopolistic position of the Associated Press precluded such restrictions.

As stated in Justice Frankfurter's concurring opinion:

"The short of the matter is that the by-laws which
the District Court has struck down clearly restrict
the commerce which is conducted by the Associated
Press, and the restrictions are unreasonable
because they offend the basic functions which a
constitutionally guaranteed free press serves in
our nation." 326 U.S. at 29.

Particularly appropriate to these circumstances is the statement of Judge Learned Hand in the District Court decision:

"[N]either exclusively, nor even primarily, are the interests of the newspaper industry conclusive; for that industry serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions

are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and will always be, folly; but we have staked upon it our all.

There is, therefore, no basis for contending that only where the Defendant is accused of increasing the price to the plaintiff can a plaintiff have any standing under the antitrust laws. We note in Section V.E. below that while damage is a necessary element under Section 4 of the Clayton Act, injunctive relief under Section 16 is not dependent upon such damage.

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Further, in the foregoing argument, Kodak fails to cite any authority. There is no support for the contention that "relevant market" is synonymous with "target area" for purposes of determining standing under Sections 4 or 16 of the Clayton Act. Further, the argument fails to recognize that Plaintiffs, as customers of Kodak are suing Kodak for damages and injunctive relief flowing from Kodak's monopolization of the market in superior quality photofinishing. Assuming Kodak has a monopoly in the relevant market, plaintiffs are forced to pay a higher price for photofinishing than if competition existed in the market. Additionally, by refusing to deal with Plaintiffs, Defendant is increasing Plaintiffs' cost of producing its magazines. Finally Defendant asserts that Plaintiffs merely have "been denied processing of sexually explicit film by Kodak." The statement is wholly unsupported.

For each of the foregoing reasons, Defendant's

arguments that Plaintiffs lack standing is in error. Plaintiffs have standing.

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E. Plaintiffs Have Suffered Irreparble Injury.

Defendant argues (Def.Br. pg. 45-48) that Plaintiffs have not adequately alleged irreparable injury. First, in citing In Re Multi-District Vehicle Air Pollution M.D.L. No. 31, supra, 481 F.2d 122 130-131. Plaintiffs overlook what the case in fact stated (infra); the injury may be existing or threatened. A plaintiff in an antitrust action can obtain injunctive relief either upon a showing of threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue to recur. Zenith Radio Corp. v. Sazeltine Research, Inc. 395 U.S. 100,130, 89 S.Ct. 1562 (1969).

What the court actually stated in <u>In re Multidistrict</u>

<u>Vehicle Air Pollution M.D.L. No. 31</u> 481 F.2d 122, (9th Cir.

1973) is as follows:

"'[Section 16] is far broader than Section 4. Any person may secure injunctive relief against threatened loss or damage by violation of the antitrust laws. Section 4 provides for recovery of treble damages only by a person injured in his business or property by [reason of] such a violation.'" [Citing Hawaii v. Standard Oil Co. 431 F.2d 1282, 1284-85 (9th Cir. 1970), affd, 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed. 2d 184 (1972).]...[1]

"Unlike standing under section 4, standing under

'commercial interests' but only an injury commercial interests' but only an injury cognizable in equity. For example, housing segregations enforced by an antitrust conspiracy of realtors constitutes an injury to excluded minority members that confers standing for injunctive relief under section 16, see Bratcher vs. Board of Realtors, 381 F.2d 723 (6th Cir. 1967), although not for treble damages under section 4. Since all of appellees herein have alleged 'threatened loss or damage' to interests cognizable in equity they have standing to seek equitable protection under Section 16 of the Clayton Act." (Emphasis added)

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Thus under Section 16 of the Clayton Act a federal court has jurisdiction to protect injuries to legally protected interests outside the purview or "target area" of the antitrust laws flowing or caused by violation of these laws, e.g. deprivation of civil rights such as freedom of speech.

Defendant's assertion that "plaintiffs alleged need for Kodak film processing services ...is simply untrue" (Def.Br. 47:9) is based upon supporting sworn statements thoroughly disputed in the opposing sworn statements, (see footnote 10, above) and as to which there is obviously a genuine issue of fact.

Defendant's argue (Def.Br. 47:18) that Plaintiff's damages would not be irreparable since the nature and extent of

their income reduction could be established by proof of reduced circulation of their magazines. However, this argument fails to recognize the fact that irreparable injury may occur as a result of the lower quality of Plaintiffs' magazines resulting in either (i) Plaintiffs' sales not increasing; or (ii) Plaintiffs' loss of relative market share even though their sales remain constant or slightly increase. Additionally the opposing sworn statements state injuries over and above loss of sales which injuries are not easily calculable. For example irreparable injury arises from the delays in the return of transparencies. Photographs are taken with the intent to incorporate them in specific issues of Plaintiffs' magazines. Any delay in their return because of Defendant's confiscation results in the material becoming valueless all as detailed in Al Faer's opposing declaration.

It is intrinsically difficult to place a monetary figure on the chilling effect that Defendant's conduct may have on Plaintiffs' exercise of their constitutional rights of free speech and press. Defendant argues that these rights are not rights which are protectable under the antitrust laws. In this regard, we again note that the scope of Section 16 of the Clayton Act goes far beyond protecting against injuries to commercial interests and includes any injury cognizable in equity flowing from a violation of the antitrust laws. See In re Multi-District Vehicle Air Pollution, 481 F.2d 122,130, quoted above. It is manifestly clear that interferences with the exercise of constitutional rights are injuries cognizable in equity.

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Grasping at straws Defendant concludes (Def.Br. 47:18) by asserting that this Court should rule as a matter of law (1) that the absence of an allegation that Plaintiffs have been prevented from publishing magazines establishes an absence of irreparable injury and (2) that if there were such suffering it results from Plaintiffs' ignoring Defendant's notice. As to the latter item we are again forced to point out that there has never been any determination of the nature of the transparencies which Kodak has confiscated. Not even Kodak has asserted that it has made this censorial decision.

Additionally, the claim is irrelevant to the question being considered. Whether Defendant can succeed with its claim of waiver under the purported exculpatory notice is discussed under Rubric IV. above. That has no bearing on whether Plaintiffs suffer irreparable injury.

As to the first point, whether or not Plaintiffs have continued to publish magazines does not establish the absence of irreparable injury; that was not the harm alleged in the first instance.

F. Plaintiffs Have Pleaded a Cause of Action Against
Kodak for an Attempt to Monopolize the High Quality
Photo Finishing Market. At 48:15 Defendant introduces its

^{11/} We respond to the footnote on Page 48 of Def Br. that Plaintiffs are publishing sexually explicit magazines. First, "sexually explicit" is clearly not the standard for what is obscene. Secondly, that is not an issue in this proceeding. One may conjecture on why Kodak lowers itself (to a footnote) to make such passing barb.

argument that its refusal to return sexually explicit material does not constitute an attempt to monopolize the photofinishing market referring to the allegations on merely two lines of Paragaraph 4 of the Complaint. We noted this previously in our discussion under Rubric V.C.1. above and we again refer to footnote 9 above, in which Paragraphs 5 and 6 of the Complaint, which go well beyond the allegations referred to in Defendant's Brief, are set out at length.

As to the Defendant's confiscation policy threatening competition we incorporate the discussion under Rubric V.A.1 above to the effect that exercise of monopoly to affect competition between third parties is within the ambit of the prohibitions of the antitrust laws.

Primarily, however, Plaintiffs do not allege or assert that Defendant's refusal to return transparencies alone creates the attempt by Kodak to monopolize the relevant portion of the photofinishing market. Plaintiffs claim that as customers of Kodak, they have been injured as a result of Kodak's illegal conduct in monopolizing or attempting to monopolize the photofinishing business. As stated in the opposing declarations Plaintiffs must bear a greater burden to utilize the services of non-Kodak laboratories than those being charged by Kodak. Additionally, if Kodak is in fact a true monopolist, there are, by definition, no alternatives to utilizing Kodak's services.

Kodak cites <u>Janich Brothers, Inc. v. American</u>

<u>Distilling Co.</u>, 570 F.2d 848,853 (9th Cir. 1977), <u>cert. denied</u>,

439 U.S. 829 99 S.Ct. (1978) as establishing various elements

for an attempt to monopolize under Section 2 of the Sherman Act. A finding of each these elements involves a resolution of difficult numerous factual issues. As discussed under Rubic II above, summary procedures should not be utilized in antitrust cases to resolve such factual issues including motive and intent - at least util such time as the plaintiffs have had a full and complete opportunity to conduct discovery. As previously stated Defendant has previously been found to have violated the Sherman Act. See <u>United States v. Eastman Kodak Co.</u>, 226 F. 62 (W.D.N.Y. 1915), <u>appeal dismissed</u>, 255 U.S. 578, (1920). Adequate discovery will cast some light on the question of whether Defendant has continued to conduct itself in an unlawful manner.

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It is well settled that pleadings in antitrust cases should be liberally construed. See Walker Distributing Co. v. Lucky Lager Braving Co., 323 F.2d. 1,3 (9th Cir. 1963); Knuth v. Erie-Crawford Dairy Cooperative Ass'n., 395 F.2d 420,423 (3d Cir. 1968). Further a plaintiff is required to merely notify a defendant of the basis of its claim and need not set out in detail the acts complained of nor the circumstances from which the pleader draws his conclusions that violation of the antitrust laws have occurred. See Louisiana Farmers'

Protective Union v. Great Atlantic & Pacific Tea Co., 131 F.2d 419,422 (8th Cir. 1942). A reading of the complaint clearly indicates that Plaintiffs have put defendant on notice of Defendant's attempt to monopolize the market for superior quality photofinishing which violates Section 2 of the Sherman Act.

G. Kodak's Refusal To Deal With Plaintiffs Violates The Sherman Act. Defendant cites United States v.

Colqate & Co., 250 U.S. 300, 39 S.Ct. 465, (1919) as authority for the proposition that its refusal to deal in the absence of any purpose to create or maintain a monopoly is not a violation of the Sherman Act. Defendant's reliance upon the Colqate case is misplaced.

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First, the Colqate case has been severely limited by subsequent decisions. See United States v. Parke, Davis & Co. 362 U.S. 29, 80 S.Ct. 503, (1960); United States v. Arnold Schwinn & Co. 388 V.S. 365, 87 S.Ct. 1856 18 (1967); Fount-Wip, Inc. v. Reddiwip, Inc. 568 F.2d 1296 (9th Cir. 1978); George W. Warner & Co. v. Black & Decker Manufacturing Co. (2d Cir. 1960) 277 F.2d 787; Six Twenty-Nine Productions v. Rollins Telecasting, Inc. 365 F.2d 478 (5th Cir. 1966).

In discussing the <u>Colqate</u> case, the Supreme Court stated as follows in <u>United States v. Parke-Davis</u>, 362 U.S. at 44:

"When the manufacturer's actions as here, go beyond mere announcement of his policy and the simple refusal to deal, and employs other means which effect adherence to his resale prices, this countervailing consideration is not present and therefore he has put together a combination in violation of the Sherman Act. (Emphasis added.)

Colgate was further limited in Schwinn, supra, in which the Court narrows its applicability to situations in which

there are ready substitutes for a manufacturers' products. The Court states:

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"At the other extreme, a manufacturer of a product other and equivalent brands of which are readily available in the market may select his customers, and for this purpose he may 'franchise' certain dealers to whom alone, he will sell his goods. Cf. United States v. Colqate & Company, 250 U.S. 300, (1919). If the restraint stops at that point - if nothing more is involved that vertical 'confinement' of the manufacturer's own sales of the marchandise to selected dealers, and if compatitive products are readily available to others, the restriction, on these facts alone would not violate the Sherman Act." 388 U.S. at 376 (emphasis added)

In the present case, one of the major factual issues in contention is whether there are, in fact, readily available comparable substitutes for Defendant's services.

In <u>Six Twenty-Nine Productions</u>, supra, the Court discussed the <u>Colgate</u> case and stated:

"While the right to refuse to purchase was here upheld, the court did so only '[i]n the absence of any purpose to create or maintain a monopoly'.

Even in Colgate there is no indication that business has an unrestricted right to deal with whomever it pleases." 365 F.2d at 481-82.

In <u>George Warner</u>, supra, the court summarizes its discussion of Colgate as follows:

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"The Supreme Court has left a narrow channel through which a manufacturer may pass even though the facts would have to be of such Doric simplicity as to be somewhat rare in this day of complex business enterprise. The right to impose its will upon distributors and retailers 'is tolerated' but only when it is the consequence of a mere refusal to sell in the exercise of the manfuacturer's right 'freely to exercise his independent discretion as to the parties with whom he will deal'. United . States vs. Parke-Davis and Co., supra. The court indicated that when the manufacturer's actions go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices' then he has put together a combination in violation of the Sherman Act. 277 F.2d at 790.

Defendant relies on Fount-Wipp, Inc. v. Reddi-Whip, 568

F.2d 1296 (9th Cir. 1978) as authority for the continued

vitality of the Colgate case. The Court in Fount-Wipp stated:

"Although a company may ordinarily deal or refuse
to deal with whomever it pleases without fear of

violating the antitrust laws (e.g. United States v.

Colgate & Co. (1919) 250 U.S. 300, 307, 39 S.Ct.

465, 63 L.Ed. 992), refusal to deal which is

anticompetitive in purpose or effect, or both, constitutes an unreasonable restraint of trade in violation of the Sherman Act.

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"Two contested factual issues were presented: (1) Did defendants refuse to deal, and (2) if so, was the refusal a product of anticompetitive motive? These factual issues cannot be taken from the jury 'unless' the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict...'*

(Citations omitted) 568 F.78 at 1300.

Thus, the <u>Coldate</u> doctrine has been severely limited to those situations in which a refusal to deal is not anti-competitive in purpose or effect and in which substitute goods or services are readily available. As was previously discussed, Rodak's refusal to deal may result in severe disruptions in the markets in which the Plaintiffs compete, and clearly there is a genuine issue of fact as to the availability of substitute services. Thus, Rodak's motive or intent in refusing to deal raises questions of fact as to whether it was anti-competitive or in furtherance of other unlawful purposes.

To support the proposition that they have an unlimited right to refuse to deal with Plaintiffs, Defendant relies on America's Best Cinema Corp. v. Fort Wayne Newspapers, Inc., 347 F.Supp. 328 (N.D. Ind. 1972), Associates & Aldrich Company, Inc. v. Times-Mirror Company, 440 F.2d 133 (9th Cir. 1971), and Adult Film Association of America, Inc. v. Times Mirror

Company, 97 Cal.App.3d 77. 158 Cal.Rptr. 547 (1979). This reliance is unwarranted since the defendants in each of these cases was a newspaper seeking to protect its rights under the First Amendment, just as Plaintiffs are here. Defendant has asserted no First Amendment right with regard to its confiscation. Furthermore, those defendants' particular conduct as newspapers was statutorily exempt from the proscription of the Sherman Act.

Newspapers, Inc., supra, held as alternative ground for denying plaintiff's relief that the defendant's conduct was specifically exempted from Sections 1 and 2 of the Sherman Act by the terms of the Newspaper Preservation Act, 15 U.S.C. § 1801 et seq. 347 F.Supp. at 334. Defendant is not relieved from liability under the antitrust laws by any special statutory provisions as were the defendants in all three of the above cited cases. Nor can Kodak assert application of the same constitutional rights as possessed by those defendants.

The Court in America's Best, supra, states as follows:

"It would be a harsh and far reaching decision

which held that a private newspaper was compelled

by a federal statute to publish advertising without

control over its contents." 347 F.Supp. at 333

In Associates & Aldrich Company, Inc. v. Times-Mirror Company, supra, the Court stated as follows:

"Respondent moved to dismiss the complaint. Its position in the district court and here is that the

decree would violate the right of freedom of the press; that a newspaper publisher may not be forced to publish advertisements which in its judgement, are in poor taste or offensive to its readers...

440 F.2d at 133.

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"Even if state action were present, as in an official publication of a state supported university, there is still the freedom to exercise subjective editorial discretion in rejecting a proffered article...[¶] Appellant has not convinced us that the courts or any other governmental agency should dictate the contents of a newspaper.

"There is no difference between compelling publication of material that the newspaper wishes not to print and prohibiting a newspapaer from printing news or other material . . . " 440 F.2d at 135.

Alpha-Sentura Business Services v. Interbank Card

Assn., 1979-2 Trade Case (CCH) ¶ 62,960 (D.C.Md. 1979),

(Def.Br. 53:28) is distinguishable from the present case in a number of respects. As previously discussed, United States v.

Schwinn, 388 U.S. 365, 87 S.Ct. 1856 (1960) restricts

permissible refusals to deal to those situations where there are readily available substitutes. The plaintiffs in

Alpha-Sentura presumably had equally desirable alternative credit card services available to them, a fact here in

dispute. Furthermore, the penultimate paragraph of the decision states that the right of businesses to refuse to deal with whomever they choose is limited by basic constitutional rights under the amendments to the constitution. Kodak's seizure of Plaintiffs' materials and its refusal to deal is a direct denial of First Amendment rights.

Kodak argues that there was no anti-competitive purpose or effect involved in Kodak's policy of refusing to process Plaintiffs' photographs (Def.Br. 54:13), and that its challenge practice applies uniformly to material tendered for processing by others (Def.3r. 54:24). As previously noted, questions of motive and intent are better not resolved by summary judgment prior to discovery. Kodak's motive or intent in promulgating its policy is peculiarly in Kodak's possession as is evidence as to whether Kodak uniformly restrains competitors of plaintiffs.

Kodak's argument is premised on the assumption that the only possible anti-competitive impact forbidden by the antitrust laws would be an anti-competitive impact in the market in which Kodak competes. As has been discussed in Section V.A. above, the anti-competitive effects giving rise to a violation of the Sherman Act can occur in other markets. The fact that Kodak's policy may be uniform does not change the fact that it directly affects competition between Plaintiffs and publications which do not include pictures of nude models.

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ADEQUATE ALLEGATIONS AND PROOF OF GOVERNMENTAL INVOLVEMENT EXISTS

Under the second of Defendant's two points numbered 3 (Cf. Def.Br. 33:1), Defendant argues (Def.Br. 55:6) that there are inadequate allegations and proof of governmental involvement.

A. Defendant Misconceives Nature Of Its Own Motion.

Defendant's statement of this point indicates its misunderstanding of its own motion. There is no burden on Plaintiffs to prove anything in response to a motion for summary judgment. Rather, all that need be done is for Plaintiffs to show a genuine issue of fact. Further, as heretofore indicated, a motion to dismiss tests the sufficiency of the pleadings, not a motion for summary judgment.

B. Allegations Are Sufficient. In any event, the allegations in each of the last three causes of action to which this point is raised are sufficient.

Paragraphs 18, 20, 21, 27 and 28 allege involvement both of the State of California and the federal government sufficient (at least for purposes of a motion for dismissal or motion for summary judgment) to constitute governmental or state action (the terms being used interchangeably and to include both federal and California action). 12/ Those allegations are set

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^{12/} See footnote 2 above.

out at length in footnote 13.

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Defendant in reciting the applicable allegations includes only a small portion of these paragraphs.

13/ "18...Plaintiffs are informed and believe, and thereon allege, that the unique superiority of Defendant's product is the result of Defendant's ownership of numerous patents granted by the United States and trademarks registered by the United States and various States. The unavailability of developing services comparable to Defendant's processing is therefore a result of its connection to federal and State Governments through the exclusive rights granted to Defendant by those Governments.

20. Defendant asserts that its basis for refusal to return Plaintiffs' film is that it would thereby risk criminal prosecution under obscenity laws, in particular, Section 311.2(a) of the California Penal Code.

21. Plaintiffs are informed and believe and thereon allege that the California legislature, in enacting Section 311.2 of the California Penal Code, has delegated to Kodak the responsibility of censoring the speech of Plaintiffs and all other customers of Kodak who wish to use Defendant's unique processing ability. Thereby, the State of California has delegated to Kodak the judicial function of determining when photographs belonging to Plaintiffs and other of Kodak's customers are obscene, so as to justify the interference by the State of California in the free and unfettered expression contained within said pictures.

27. Defendant asserts that its basis for refusal to return Plaintiffs' transparencies is that it would be liable to Federal criminal prosecution under Section 1461, 1462 and 1465 of Title 18 of the United States Code, if it knowingly mailed or transported in interstate commerce the developed film, or if it distributed pictures using film which had been transported in interstate commerce.

28. Plaintiffs are informed and believe and thereon allege that the United States Congress, in enacting Sections 1461, 1462 and 1465 of Title 18 of the United States Code, has delegated to Kodak the responsibility of censoring the speech of Plaintiffs and all other customers who wish to use Defendant's unique processing ability. Thereby, the United States Congress has delegated to Kodak the judicial function of determining when photographs belonging to Plaintiffs and other of Kodak's customers are obscene, so as to justify the interference by the United States Government in the free and unfettered expression contained within said pictures.

(Def.Br. 57:1.)

C. Defendant's Own Statements Destroy Its Premise.

Defendant seeks to prevail by arguing at Def.Br. 55:18 that: "These allegations are plainly untrue. Kodak's policy and practice of refusing to return certain sexually explicit pictures are its own, neither authorized nor required by any governmental official or agency."

The response to the foregoing is, first, that the truth or falsity of the allegations is a factual determination which cannot be made in Defendant's favor unless there is no possibility that Plaintiffs can prevail.

Secondly, we have noted under Section I.B. above some of the innumerable times that Defendant within its own supporting affidavit, its own request for findings of fact and its own Brief expresses that the reason Kodak established this policy and practice was the fear of prosecution under state or federal law. What could be a clearer demonstration of response to compulsion of state action than an act done out of fear of that state action. Defendant appears to be attempting to ride the horse in two directions at the same time. First it claims its policy was adopted under compulsion of state and federal laws and then it claims that its policy and practice had nothing to do with state or federal laws.

Even viewing this matter most adversely to Plaintiffs, this issue is clearly one of motive and intent and as such ought not be ruled upon by summary judgment procedures or at least certainly not before adequate discovery all as reviewed under Rubric II above.

D. State Action Can Be Found When The State Or Federal
Government Compels Kodak To Confiscate Plaintiff's

Photographs. A party is acting under color of state of factual law when a statute requires a course of conduct and punishes those who fail to comply with its mandates. Adickes v. Kress & Co. 398 U.S. 144, 90 S.Ct. 1598 (1970); Robinson v. Florida, 378 U.S. 153, 84 S.Ct. 1693 (1964); Doe v. Charleston Area Medical Center, Inc., 529 F.2d 638 (4th Cir. 1975).

 In <u>Adickes</u>, supra, the defendant refused to serve lunch to plaintiff at its restaurant facilities in Mississippi.

Plaintiff sued to recover damages under 42 U.S.C. \$1983 for alleged violations of her constitutional rights under the Equal Protection Clause of the 14th Amendment. In reversing the lower court's grant of defendant's motion for summary judgment, the Supreme Court stated:

"For petitioner to recover under the substantive count of her complaint, she must show a deprivation of a right guaranteed to her by the Equal Protection Clause of the Fourteenth Amendment... We must decide, for purposes of this case, the following 'state action' issue: Is there sufficient state action to prove a violation of petitioner's Fourteenth Amendment rights if she shows that Kress refused her service because of a state enforced custom compelling segregation of the races in Hattiesburg restaurants?" 398 U.S. at 169.

"The question most relevant for this case, however,

is... whether the decision of an owner of a ì 2 restaurant to discriminate on the basis of race 3 under the compulsion of state law offends the 4 Fourteenth Amendment. Although this Court has not 5 explicitly decided the Fourteenth Amendment state 6 action issue implicit in this question, underlying 7 the Court's decision in the sit-in cases is the notion that the State is responsible for the 8 9 discriminatory act of a private party when the 10 State, by its law, has compelled the act. As the 11 Court said in Peterson v. City of Greenville, 373 U.S. 244 (1963): 'When the state has commanded a 12 13 particular result, it has saved to itself the power 14 to determine that result and thereby 'to a 15 significant extent' has 'become involved' in it'. 16 Moreover, there is much support in lower court 17 opinions for the conclusion that discriminatory 18 acts by private persons done under the compulsion 19 of state law offend the Fourteenth Amendment. In 20 Baldwin v. Morgan, supra, the Fifth Circuit held 21 that '[t]he very act of posting and maintaining 22 separate [waiting room] facilities when done by the 23 [railroad] Terminal as commanded by these state 24 orders is action by the state.' The Court then 25 went on to say: 'As we have pointed out above the 26 State may not use race or color as the basis for 27 distinction. It may not do so by direct action or

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through the medium of others who are under State

compulsion to do so. ...

"For state action purposes it makes no difference of course, whether the racially discriminatory act by the private party is compelled by a statutory provision or by a custom having the force of law — in either case it is the State that has commanded the result by its law. Without deciding whether less substantial involvement of a State might satisfy the state action requirement of the Fourteenth Amendment, we conclude that petitioner would show an abridgment of her equal protection right, if she proves that Kress refused her service because of state—enforced custom of segregating the races in public restaurants." 398 U.S. at 170-171.

In the present case, Kodak claims that it is required to confiscate and destroy certain materials submitted to it since failure to do so will result in prosecution or its employees under various state and federal state laws regulating obscenity. Kodak's rationale is as follows: (1) material submitted to it is legally obscene; (2) Kodak does not become aware of the nature of the material submitted to it for processing until such time as the processing is complete; (3) once it becomes aware of the nature of the material, its return of the material to a customer would be a violation by it or its employees of the obscenity laws; (4) if legally obscene, the material is contraband and the parties submitting it have no right to its return; (5) therefore, once Kodak becomes aware of

the nature of the material, the only way it or its employees can avoid criminal prosecution is to confiscate and destroy this material. Thus, it contends the State of California and the federal government have compelled Kodak not to return the materials to its customers.

A result similar to Adickes was reached in Robinson v.

Florida, 378 U.S. 153, 84 S.Ct. 1693 (1964) which reversed the defendants' convictions for trespass and thereby held that the private party lost his right of property all because his decision to not serve negroes was promoted by a regulation adopted by the Florida legislature. There was no law requiring discrimination by the owner. However, the state required that in places where black persons were employed or accomodated, separate toilet and lavoratory facilities must be provided. The Supreme Court found this to be a sufficient state involvement in discriminatory practices since the requirement of separate facilities placed an added burden upon restaurants serving both whites aned blacks. Hence, the state, through its laws, encouraged restaurants to discriminate.

The court stated:

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"While these Florida regulations do not directly and expressly forbid restaurants to serve both white and colored people together, they certainly embody a state policy putting burdens upon any restaurant which serves both races, burdens bound to discourage the serving of the two races together. Of course, state action, of the kind that falls within the proscription of the Equal

Protection Clause of the Fourteenth Amendment, may be brought about through the State's administrative and regulatory agencies just as through its legislature. 378 U.S. at 156.

If the owner's enforcing his ownership rights was subject to the Fourteenth Amendment, all because of the mere regulation which induced the discrimination, then Kodak's confiscation done under alleged compulsion of state and federal laws must be subject to the First and Fourteenth Amendments.

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The court in Robinson referred to the case of Peterson v. City of Greenville, 373 U.S. 244, 83 S.Ct. 1119 (1963) and stated the following:

"The petitioners in Peterson were convicted of trespass in violation of a city ordinance after they had seated themselves at a lunch counter and remained there over the manager's protest. At the time, however, there existed another Greenville ordinance which made it unlawful for restaurants to serve meals to white persons and colored persons in the same room or at the same table or counter. In Peterson the city argued that the manager's refusal to serve Negroes was based on his own personal preference, which did not amount to 'state action' forbidden by the Pourteenth Amendment. But we held that the case must be decided on the basis of what the ordinance required people to do, not on the basis of what the manager wanted to do. We said:

'when a state agency passes a law compelling persons to discriminate against other persons because of race, and the State's criminal processes are employed in a way which enforces the discrimination mandated by that law, such a palpable violation of the Fourteenth Amendment cannot be saved by attempting to separate the mental urges of the discriminators'*. 378 U.S. at 155-156 citing, Peterson v. City of Greenville, 373 U.S. at 248.

Similarly, according to Kodak it is required by state and federal law to confiscate Plaintiff's transparencies.

Kodak's argument that this does not amount to state action because it unilaterally adopted its practice must be equally unavailing.

Doe v. Charleston Area Medical Center, Inc., 529 F.2d
638 (4th Cir. 1975) is extremely similar to the case at bar.
Plaintiff there sought declaratory and injunctive relief
against a hospital for refusing to allow plaintiff's physician
to perform an abortion on plaintiff at the hospital.

Defendant's policy stemmed from fear of criminal prosecution
under a state law which made it a crime to perform an abortion
which was unnecessary to save the life of another. In finding
"state action" for purposes of 42 U.S.C. \$1983 the Court stated:

"Since state involvement through a custom having the force of law satisfies the 'color of law' requirement of 42 U.S.C. \$1983, a fortiori the

statute in this case meets the requirement...In this case, a letter from Mr. Arnwine, president of CAMC, set forth the hospital's policy and the motivation for that policy as follows:

"The present policy... with respect to performance of abortions at its hospital facilities is to literally adhere to the mandate set forth in Chapter 61, Article 2, Section [8] of the West Virginia Code. As you are aware, this statute limits the performance of abortions in the State of West Virginia to those instances where such act is done in good faith with the intention of saving the life of such woman and child...'

"It seems clear that the anti-abortion hospital

policy rests firmly upon what was thought to be the compulsion of state law. Thus the hospital acted 'under color of law'"... 529 F.2d at 643-44.

In <u>Reitman v. Mulkey</u>, 387 U.S. 369,378, 87 S.Ct. 1627,1632-163 (1975) stated:

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"This Court has never attempted the 'impossible task' of formulating an infallible test for determining whether the State 'in any of its manifestations' has become significantly involved in private discriminations. 'Only by sifting facts and weighing circumstances' on a case-by-case basis can a 'nonobvious involvement of the State in private conduct be attributed its true

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Therefore if one acts under compulsion of state law, he acts under color of state law, and that's exactly the situation here.

E. No Need To Show Private Party As Instrumentality.

In <u>Simkins v. The Moses Cone Memorial Hospital</u>, 323 F.2d 929 (4th Cir. 1963), the Court held there was state action so as to permit injunctive relief in favor of a black physician against the defendant private hospital by virtue of that hospital's receipt of state and federal grants. It was suggested that the determination rested upon whether or not the hospital was an instrumentality of the government. The Court responded:

"[W]e would formulate the initial question differently to avoid the erroneous view that for an otherwise private body to be subject to the anti-discrimination requirements of the Fifth and Fourteenth Amendments it must actually be 'render[ed an] instrumentalit[y] of government***.' In our view the initial question is, rather, whether the state or the federal government, or both, have become so involved in the conduct of these otherwise private bodies that their activities are also the activities of these governments and performed under their aegis without the private body necessarily becoming either the instrumentality or the agent in the strict sense."

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Further the Court stated:

"Here the most significant contracts compel the conclusion that the necessary 'degree of state [in the broad sense, including federal] participation and involvement' is present as a result of the participation by the defendants in the Hill-Burton program." 323 F.2d at 967.

F. Trademark And Patent Rights Granted Defendant Are

Significant. Commencing at 58:5 of Defendant's Brief, Defendant argues that the exclusive patent and trademark rights do not create state action. The most immediate response thereto is that taken alone perhaps such trademark and patent rights would not create state action. However, in combination with the compulsion of the obscenity statutes, they do bear on whether or not state action exists.

Additionally, Defendant's assertion that the federal patents and trademarks are irrelevant to the Second Cause of Action is in error in that Plaintiffs allege that Defendant acquired state trademarks as well as federal.

Independently, we urge that these patents and trademarks do create state action thereby subjecting Defendant to Plaintiffs' constitutional rights. If the receipt of state funds to assist in the construction of housing [McQueen v. Druker, 438 F.2d 781 (1st Cir. 1971)], exemption from taxation [McGlotten v. Connally, 338 F.Supp. 448 (D.C. 1972)], receipt

of funds for construction of a hospital [Simkins v. The Moses Cone Memorial Hospital, 323 P.2d 929 (4th Cir. 1963)], or a lease of public property [Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856 (1961)] can create state action (as it did in each of those cases) then why not the receipt of a patent or a trademark, much less both.

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Defendant's argument insofar as patents are concerned is further defective in that it proceeds from the statement that "the mere grant of a corporate charter is a ministerial government act which does not...make the latter's business...'state action'." (Def.Br. 58:25.) That may be true of corporate charters but it is not true of patents.

Discretion and judgment is exercised by the officers of the Patent Office at every step in the patent procedure until such time as the bargain is struck with the patentee. Applications are subjected to extensive review to determine whether the invention meets the requisite "Novelty" and "Now-Obvious Subject Matter" criteria. 35 U.S.C. \$\$102, 103. The reviewing officer must state his reasons for rejecting an application. 35 U.S.C. \$132. If after rejection, the applicant persists in his claim, the reviewing officer must re-examine the application. 35 U.S.C. §132. In certain circumstances holders of competing patent claims may join in these proceedings. 35 U.S.C. \$135. An applicant whose claim(s) have been twice rejected may appeal to the Board of Appeals within the Patent Office. 35 U.S.C. \$134. If still dissatisfied, an applicant may further appeal to the Court of Customs and Patent Appeals or to the District Court for the

District of Columbia. 35 U.S.C. 55141, 145, 146.

It is clear that the officers of the Patent Office are performing more than ministerial acts in reviewing a patent application, in awarding rights and powers pursuant to the Constitution, and in entering into a contract with the patentee regarding the scope and exercise of these constitutional powers. Thus, federal action can be found in action pursued in the exercise of these powers and rights.

The cases cited by Defendant involving corporate charters, liquor licenses and business licenses (Def.Br. pg. 59) are distinguishable from patents and trademarks because a patent is a direct grant of powers and rights pursuant to the Constitution. U.S. Const., Art. I, §8, cl.8. Patents are issued not for private benefit but for the public good, and in rewarding invention the rights and welfare of the community must be fairly dealt with. See Sears Roebuck & Co. v. Stiffel, 376 U.S. 225, 84 S.Ct. 784 (1964), Griffith Rubber Mills v. Hoffar, 313 F.2d 1 (9th Cir. 1963).

Jackson v. Metropolitan Edison Co., 419 U.S. 345, 95
S.Ct. 449 (1974), relied on by Defendant (Def.Br. 60:10) is
distinguishable in that the Court in Jackson doubted that the
state had ever granted or guaranteed the power Company a
monopoly. 419 U.S. at 352. The grant of a patent, however, is
clearly a grant of monopoly. Secondly, the Supreme Court
acknowledged that a heavily regulated utility with at least
something of a governmentally protected monopoly will more
readily be found to be "state" acts than will the acts entity
lacking these characteristics. Id. The same is true with

respect to Taylor v. St. Vincent's Hospital, 523 F.2d 75 (9th Cir. 1975).

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The District Court abortion case cited by Defendant at 60:16 of its Brief is in conflict with the opposite decision in Doe v. Charleston Area Medical Center, Inc., 529 F.2d 638 (4th Cir. 1975) discussed under Section VI.D. above. On the basis of the foregoing, we urge that either with or without the obscenity statute compulsion the holding of a patent especially in combination with the holding of a trademark creates federal governmental action.

We believe that the entire discussion, however, is unnecessary in that the concession by Defendant that it is acting under compulsion of the state and federal obscenity laws should resolve the issue by a determination that indeed state action is involved and that therefore Defendant is subject to the constitutional proscriptions imposed upon California and the United States.

G. Obscenity Statutes Create State Action. Either by themselves or at least in combination with the patent and trademark rights granted by the federal and state governments, there is sufficient connection or involvement between Defendant and the government so as to classify its practice of confiscating films as "state action".

Defendant argues that there has been no delegation of the censorship function by the government to Kodak (Def.Br. 61:15). This contention fails for a variety of reasons.

First, Plaintiffs need not show an actual formal delegation of censorship responsibility. The fact is that Kodak has assumed

the role of a censor and of that there can be no dispute.

Additionally, whether or not we call Kodak a censor, the fact is that it is confiscating property and precluding the publication of certain transparencies under the compulsion of obscenity laws and this is proved by Kodak's own assertions as heretofore noted.

The fact that no governmental agency asked Kodak to do what it is doing doesn't mean that Kodak's confiscation doesn't constitute state action. There is no requirement for a formal demand by the government.

Kodak's assertion that it does not act as a censor (Def.Br. 61:22) is belied by the true facts. Kodak reviews the pictures and transparencies and decides which ones it will permit to be returned to the owner thereof. It does so on the basis of the content of the film and its evaluation of whether that content is or is not obscene. What else could be involved in censorship?

Kodak contends that it has adopted this policy to avoid prosecution under the law. The authorities cited under Rubric VI.C., above demonstrate that in such circumstance, there is automatically state action involved.

At Def.Br. 62:2 Kodak argues its motivation for adopting its confiscation policy. We have quoted from Peterson v. City of Greenville, 373 U.S. 244, 83 S.Ct. 1119 (1963) in Section VI.D. above to the effect that the asserted motivation is not the determining factor once a determination has been made that the conduct was done by virtue of an informal state policy or pursuant to statute. Here Kodak concedes that its

conduct was done pursuant to and under compulsion of the obscenity statutes.

Without authority, Defendant argues that it is specious to contend that there is governmental action here merely because Kodak's policy was adopted to avoid prosecution. Again we note that Kodak apparently simply ignores the three cases cited at the threshold of Section VI.D. above; threat of prosecution did not avoid a finding of state action there and it should not here.

Defendant erroneously guesses that our reliance is solely upon Marsh v. State of Alabama, 326 U.S. 501, 66 S.Ct. 276 (1946) (Def.Br. 62:25). We have above (\$VI.D.) discussed the other cases which support a finding of state action.

However, Kodak's attempted distinction of the Marsh case on the basis that its "position would be analogous to the company town [in Marsh] only if it appeared that Kodak was an officially sanctioned censor..." (Def.Br. 63:8.) is erroneous. There is no holding in Marsh that the company town was officially sanctioned to bar the distribution of religious literature. That was not the premise for the decision therein.

Admittedly, Kodak's practice does not totally bar Plaintiffs' publications. (Def.Br. 63:16.) There is nothing cited by Kodak to support the conclusion that only if the entire publication were barred could Kodak's actions be deemed to be governmental action. Available alternatives in the cases we have cited above show that that is not the law.

The true test is whether Kodak's policy denies

Plaintiffs the ability to get the quality pictures they require

and, as to the pictures already confiscated, whether Plaintiffs could ever use those transparencies.

In <u>Korzenik v. Marrow</u>, 401 F.Supp. 77,85 (S.D.N.Y. 1975) the Court held that a private political club could be liable under Section 1983 as exercising state action when its selection of candidates was of overwhelming significance in the ultimate election. If a traditionally governmental activity is assumed by a private party, then he is subjected to the constitutional prohibitions. Can there be any doubt but that censorship has been a traditionally governmental activity.

Defendant relies heavily on Flagg Bros. v. Brooks, 436 U.S. 149, 98 S.Ct. 1729 (1978). That case specifically notes that it is limited to the so-called "dispute resolution" problems and that other governmental functions such as "education, fire and police protection, and tax collection" would not be treated the same. 98 S.Ct. at 1737. We suggest that censorship falls far closer to police protection in terms of traditional governmental activity than does dispute resolution.

Defendant seeks to expand the statement in Flagg Bros. regarding "commercial transaction" beyond what the Court intended. The commercial transaction limitation cannot be viewed too narrowly. The relationships in Adickes v. S. R. Kress and Company, 398 U.S. 171, 90 S.Ct. 1598 (1970), as well as Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983 (1972) and Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S.Ct. 1820 (1969) involved as much a commercial transaction as here. In Flagg the "dispute resolving" of a commercial transaction was

at the center of the case. Here the heart of the matter is Plaintiffs' freedom of speech and the statutes pursuant to which Defendant attempts to interfere therewith.

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Additionally, in <u>Flagg Bros</u>. the Court (98 S.Ct. at 1737) notes that the statute pursuant to which the lien rights were exercised provided for adequate remedies for improper exercise of such rights. Other than this action, there is no remedy available to Plaintiffs by reason of Defendant's confiscation done purportedly to comply with the obscenity statutes and of course the obscenity statutes do not provide for any such remedies.

Courts have imposed a substantial set of due process requirements upon censors. See Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734 (1965); United States v. Thirty Seven
Photographs, 402 U.S. 363, 91 S.Ct. 1400 (1971); Blount v.
Rizzi, 400 U.S. 411, 91 S.Ct. 423 (1971); Southeastern
Promotions Ltd. v. Conrad, 420 U.S. 546, 95 S.Ct. (1975) 1239, 43 L.Ed. 2d 448; Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 88 S.Ct. 1298 (1968).

The basic due process requirements can be summarized as follows: (1) the standard for determining whether a work is obscene must comply with constitutional standards of obscenity and may not be vague, overly broad or imprecise; (2) the burden of proving that the work is unprotected expression must rest on the censor; (3) the censor, within a specified brief period, either issue a license or go to court to restrain the use of the allegedly obscene material; (4) any restraint imposed in advance of a final judicial determination on the merits must

similarly be limited to the preservation of the status quo for the shortest fixed period compatible with sound judicial resolution; (5) the censorship procedure must also assure a prompt final judicial decision to minimize the deterent effect of an interim and possibly an erroneous denial of a license.

Preedman, supra, 380 U.S. at 58-59; 85 S.Ct. at 739.

Interstate Circuit, supra, 380 U.S. at 684-689; 88 S.Ct. at 1303-1306.

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Rodak has complied with none of the foregoing and Plaintiffs have been afforded none of the foregoing rights. Under such circumstances, the requirement of Flagg Bros. for adequate remedies through the same statute that creates the challenged practice is not here met. If the statutes can be interpreted (as Rodak has interpreted them) in a manner that does not provide the constitutionally required safeguards, then clearly the adequate remedy to which Flagg referred is not here present.

Nor can the absence of a State employee in the litigation be treated as the vital distinguising factor. No State official was a party in Adickes v. S. H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598 (1970) and, therefore, that limitation cannot be applied on a wholesale fashion. The absence of official involvement in the litigation is equally true in Doe v. Charleston Area Medical Center, Inc., 529 F.2d 638 (4th Cir. 1975), Jackson v. Statler Foundation, 496 F.2d 623 (2nd Cir. 1974), McQueen v. Drucker, 428 F.2d 781 (1st Cir. 1971), Simkins v. The Moses Cone Memorial Hospital, 323 F.2d 929 (4th Cir. 1963) and McGlotten v. Connally, 338 F.Supp. 448 (D.C.

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Perhaps the most vital distinction of <u>Flagg Bros</u>. is demonstrated by its discussion of <u>Adickes v. S. H. Kress & Co.</u>, 398 U.S. 144, 90 S.Ct. 1598 (1970). With respect thereto, the Court stated:

"Our cases state 'that a State is responsible for the...act of a private party when the State, by its law, has compelled the act.' Adickes, supra, [citation]. This Court, however, has never held that a State's mere acquiescence in a private action converts that into that of the State... "Here, the state of New York has not compelled the sale of a bailor's goods, but has merely announced the circumstances under which its courts will not interfere with a private sale." 436 U.S. at 164-166, 98 S.Ct. at 1737-1738.

There is not merely "acquiescence" here. Kodak contends that it is acting to avoid prosecution under the obscenity statutes and if one accepts Kodak's interpretation, then in every meaningful way those obscenity statutes compel Kodak's confiscation policy. That element wholly distinguishes this case from the Flagg case and from the other cases upon which Defendant relies.

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DEFENDANT HAS NOT ESTABLISHED THAT THERE IS NO GENUINE ISSUE OF FACT WITH RESPECT TO THE PLAINTIFFS' ENTITLEMENT TO DECLARATORY RELIEF

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On the state of the present record it would appear impossible for this Court to decree that Plaintiffs are without any remedy by reason of Defendant's confiscation of their films or Defendant's threat to do so in the future. To conclude merely that Plaintiffs are left with a replevin action is wholly insufficient as is discussed more fully below and in the opposing sworn statements. That means that either Defenant has been acting improperly in which case Plaintiffs are entitled to relief on one of the first three causes of action or (if Defendant's conduct is deemed proper), then it arises by virtue of state and federal obscenity statutes being interpreted in a way to constitute a prior restraint. There is no other forum or action for properly testing that issue.

A. Need For Declaratory Relief. Defendant's argument (Def.Br. 65:1), if successful, would force Plaintiffs to incur the enormous risks and injury which arise when Plaintiffs submit film to Defendant and then the transparencies are not returned. (Opposing sworn statements.) Defendant would have Plaintiffs file repeated lawsuits seeking the mere return of these by then stale transparencies. An action for mere possession would be fruitless in that by the time transparencies are returned they would be of little, if any, value. In addition, in these circumstances declaratory relief

is the proper means of obtaining a definitive adjudication of rights, thereby avoiding litigation each time a wrong is committed. See Roe v. Wade, 410 U.S. 113,126, 93 S.Ct. 705,713 (1973); Doe v. Charleston Area Medical Center, Inc., 529 F.2d 638,644 (4th Cir. 1975). This case presents a classic example of an action "capable of repetition, yet evading review". Roe v. Wade, supra, 410 U.S. at 125. Declaratory relief should be granted even if the material is returned to plaintiffs.

Furthermore, as noted, a mere return of plaintiffs' material will not relieve the irreparable injury which will be caused by repeated failure to timely return material in the future-loss of value because of an inability to meet printers' and other deadlines and thereby use the material in the manner and in the publication intended.

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Repeated state actions are of little value to Plaintiffs or the judicial system.

B. Adverseness Exists. Defendant argues that there is a lack of concrete adverseness (Def.Br. 65:21), that there is a lack of substantial controversy between the parties (Def.Br. 66:3) and that it has no interest in defending the constitutionality of the challenged laws (Def.Br. 67:16). In virtually the next breath, however, Defendant concedes that it "is only interested in obeying the laws as they exist".

Isn't the adverse posture of the parties proved by the fierceness with which this litigation is pursued. If Kodak had no interest in defending the constitutionality of the statute and if all it wanted to do was be secure against possible prosecution, why does it not simply stipulate to an order that

it shall return to its customers all pictures regardless of their content. Surely obeying such an order could not constitute a crime.

On the other hand, if the application of the obscenity statutes cannot be made so as to constitute a prior restraint, then the same should be declared unconstitutional and Kodak would then be free from the alleged fear of prosecution.

It should be noted that Kodak has completely failed to support its claims of feared criminal prosecution by citation of any authority, whatsoever, that there is even a remote chance that Kodak could be prosecuted under state or federal obscenity laws for merely returning photographic material to plaintiffs. Kodak concedes that no government official or agency has requested that it impliment this policy. (Def.Br. 55:19.) Kodak's fear of criminal prosecution appears specious and its policy of confiscation amounts to a deprivation of constitutional rights which can be resolved by a declaration of the validity of the application of the obscenity statutes to a film developer's return of film.

C. Failing To Obtain Declaratory Relief Permits Abuse By Roda. We contend that the interference with the editorial process at such an early stage constitutes a prior restraint on the freedom of press. (See discussion under Rubric III above.)

If, however, Defendant's practice were to be sanctioned, the underlying laws would have to be attacked and declared unconstitutional. As matters now stand, there is nothing to prevent Defendant from retaining all pictures under

the guise that it is retaining same because Defendant deems them to be obscene.

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Consider the following: What if a statute were passed that photographs displaying Blacks and Caucasians was deemed to be obscene. Would Kodak then be entitled to confiscate such pictures?

Even easier, what if there were no such statute but

Kodak deemed such pictures obscene. Is there to be no relief

against this practice? What if the retained pictures were

photographs taken demonstrating crimes committed by public

officials. Is Kodak to be entitled to confiscate such pictures

under the guise that they are obscene and that Kodak fears

prosecution under the obscenity laws?

The way to attack the problem is to declare that obscenity statutes do not threaten film developers from the act of developing or returning film to its owner.

Since Defendant is asserting that the mere return of developed film subjects them to prosecution of the obscenity laws, presumptively the transmission to anyone else would subject Kodak to prosecution for the obscenity laws. Kodak apparently contends that Plaintiffs' prior publications are obscene. Yet Defendant has handed from itself to its counsel and from its counsel to this Court copies of such magazines. Where is the exemption for that prosecution? Why has Kodak not feared prosecution for that transmission?

D. <u>Kodak's Defense</u>. Defendant contends that it does not intend to defend the constitutionality (Def.Br.

67:21). Why then has it answered the Fourth Cause of Action?

Why did it not permit the cause of action to go by default? Obviously, Kodak is defending and does intend to do so.

E. Response To Authorities Cited By Defendant. We believe that Kodak's position is so weak that no detailed response to the cases cited is required. However, exemplary of the inapplicability of the authorities cited by Defendant is the following:

Defendant first cites <u>Golden v. Zwickler</u>, 394 U.S. 103, 89 S.Ct. 956 (1969). Defendant's reliance thereon is not well placed. In <u>Golden</u>, the Supreme Court found that the case or controversy had become moot by the time it had reached that Court and should, therefore, be dismissed since an actual controversy must generally exist at all stages of review not merely at the time the complaint is filed.

Kodak's reliance on Mendez v. Heller, 530 F.2d. 457 (2d Cir. 1976) is not well placed. In that case, the plaintiff sought to challenge a New York statute requiring two years of residency prior to filing for divorce. Plaintiff filed her Federal action attempting to have this statute declared unconstitional prior to actually having attempted to file for divorce in the appropriate New York State Courts. On these facts, the court held that where plaintiff had made no attempt to secure a divorce, but rested upon a hypothethical assumption that, if she filed for divorce, her complaint would be rejected pro forma without consideration of constitutional issues. This case did not present the exigent adversity required for Federal Court adjudication. 530 F.2d. at 461. The courts are more ready to review threatened deprivations of First Amendment

Rights than in other situations. Zwickler v. Koota, 392 U.S. 241,254, 88 S.Ct. 391,399 (1967); Wolff v. Selective Service Local Board No. 16, 372 P.2d 817 (2d Cir. 1967). In contrast to the situation in Mendez, all possible events have occurred to create an actual dispute between the parties. Plaintiffs have tendered film for processing to defendant and defendant has refused to return the films to plaintiffs. Thus, the "exigent adversity" clearly exists.

Pinally, the contention that Granfield v. Catholic University of America, 530 P.2d 1035 (D.C. Cir. 1976) (Def.Br. 68:1) requires the joinder of representatives of the bodies enacting the statutes is in error as demonstrated by other cases cited by Defendant itself. The Court, if it deems it advisable, can notify the appropriate governmental officials and invite them to join this lawsuit. 28 U.S.C. §2403.

F. Conclusion. For each of the foregoing reasons,

Defendant's argument that as a matter of law

declaratory relief should not be allowed is in error.

Declaratory relief should be a favored remedy in this situation.

VIII

WERE DEFENDANT TO PREVAIL, IT IS NOT ENTITLED TO ATTORNEY'S FEES

Defendant seeks an award of attorney's fees in the event the Court grants its motion of summary judgment. (Def.Br. 70:5) Based on the arguments presented in prior portions of

this brief, we believe Defendant should not prevail; it is manifestly evident that there are genuine issues of fact under the Complaint which states claims for which relief can be granted. Although it may be correct that an award of attorney's fees under 42 U.S.C. \$1988 does not require a showing of bad faith, all of the cases state that absent plaintiff's bad faith a prevailing defendant must show either that plaintiff's action was frivolous or vexatiously brought.

Sethy v. Alameda City Water District, 602 F.2d 894,897 (9th Cir. 1979). In Rlotz v. United States, 602 F.2d 920 (9th Cir. 1979) cited by Defendant the court set forth the following test:

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"The district court denied attorney's fees on the ground that Klotz had failed to carry his burden of establishing that the Government's counterclaim was brought 'in bad faith or in a frivolous or vexatious manner or that the counterclaim was brought for the purpose of harrassment.'... We agree with the district court that the taxpayer had the burden at least of establishing that the Government's counterclaim was 'frivolous or vexatious... Neither label can be attached to the counterclaim in this case. (Cf. Christiansburg Garment Co. v. EEOC (1978) 434 U.S. 412, 421, 98 S.Ct. 694, 54 L.Ed.2d 648.)" 602 F.2d at 924.

In Goff v. Texas Instruments, Inc., 429 F.Supp. 973

(N.D. Tex. 1977), cited by Defendant the Court stated:

"The court must apply the standard of 'clearly

frivolous' with some discrimination since Senate
Report No. 94-1011 emphasized that private
attorneys general should not be penalized for
proceeding with a claim which 'though meritless was
made in good faith' ... The court understands this
report ... to mean that a court should not assess
penalties against a plaintiff for proceeding on a
novel but nonfrivolous legal theory." 429 F.Supp.
at 976 (Citations omitted).

It is clear that Plaintiffs' complaint is neither frivolous, nor meritless, nor vexatious, nor was it brought in bad faith. There is substantial authority supporting all of the legal theories propounded by plaintiffs. Federal question jurisdiction exists as to all of plaintiffs' claims.

Furthermore, the adjudication of plaintiffs' antitrust claims are within the exclusive purview of the federal courts Miller v. Granados, 529 F.2d 393,395 (5th Cir. 1976).

Defendant argues that this action is merely parallel to the pending Superior Court cases. (Def.Br. 23:70.) This statement is wholly false. It in effect repeats the assertion made in a footnote on page 30 of Defendant's Brief where Rodak asserts that granting of this motion for summary judgment will not leave Plaintiffs without a judicial forum within which to air their grievances. This is patently untrue since the issues in Los Angeles Superior Court Case No. C 313 377 are different from those involved in this Federal Court Action. First, Plaintiffs have not sought relief from violations of the

antitrust laws in the State Court action and Federal Courts have exclusive jurisdiction to adjudicate claims arising from violations of these laws. See Blumenstock Brothers Advertising Agency v. Curtis Publishing Company, 252 U.S. 436, 40 S.Ct. 385 (1920); and Miller v. Granados, 529 F. 2d 393 (5th Cir. 1976). Furthermore, in the State Court action, Plaintiffs have sought neither relief under Title 42, Section 1983, an adjudication of Defendant's violations of Plaintiffs' First and Fifth Amendment rights under color of federal law, nor a declaration of the validity of Title 18, Sections 1451-1465 as they apply to the relationship between Plaintiffs and Defendant. All of the above claims arise under the United States Constitution or federal statutes, are properly before this Court and not raised in the State action which primarily is for replevin only.

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Next, Defendant is not free to dictate Plaintiffs' choice of forum. The above claims clearly arise under the Constitution and laws of the United States. The Federal Courts are clearly the most appropriate forum for adjudicating these claims and the statutes granting of jurisdiction to the Federal Courts to adjudicate these claims allow Plaintiffs the choice of forum in which to litigate.

Finally, as emphasized above, repeated state actions are of little value to Plaintiffs.

In summary, it is respectfully submitted that even if this court were to grant summary judgment, defendants have failed to carry their burden of establishing that plaintiffs' claims were vexatiously or frivolously brought or brought in bad faith, and are thus not entitled to an award of attorneys' fees.

CONCLUSION

There can be no doubt but that Kodak has injected itself into the editorial process of Plaintiffs' publications. By virtue of the state action in enacting obscenity statutes which (if Kodak's interpretation were correct) improperly place at risk those uninvolved with the publication itself, Kodak has redefined obscenity in a manner never approved by any court, set itself up as a censor to review without any court intervention the content of proposed photographs, confiscated those photographs it deems obscene and now tells this Court that parties injured by such conduct should simply seek a common law action for return of the stale photographs even though such relief is valueless to those who plan to use such photographs to exercise their freedom of speech and press.

Combined with the anti-competitive nature of Kodak's activities and its monopolistic position, it appears self-evident that if this Court cannot now determine Kodak's ultimate liability, surely there are genuine issues of fact to be resolved at a trial in this action and the pending motion must be denied.

DATED: August 26, 1980.

Respectfully submitted,

ALAN L. ISAACMAN RICHARD D. AGAY COOPER, EPSTEIN & H

COOPER, EPSTEIN & HUREWITZ A Professional Corporation Attorneys for Plaintiffs

Attorneys for Plaintiffs

" RICHARD D. AGAY

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Attorneys for Plaintiffs

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HUSTLER MAGAZINE, INC., a corporation, and CHIC MAGAZINE, INC., a corporation, Plaintiffs,

VS.

EASTMAN KODAK COMPANY, a corporation,

Defendant.

CIVIL ACTION NO. 80 00561 IR

PLAINTIFFS' DECLARATIONS AND AFFIDAVIT IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiffs submit the following declarations and affidavit in opposition to Defendant's motion for summary judgment.

DATED: August 25, 1980

ALAN ISAACMAN RICHARD D. AGAY COOPER, EPSTEIN & HUREWITZ A Professional Corporation Attorneys for Plaintiff

RICHARD D. AGAY

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STATE OF CALIFORNIA 1 COUNTY OF LOS ANGELES

I. AL PAER, state the following:

BACKGROUND

- 1. Since January, 1978, I have been employed by Larry Flynt Publications, Inc. and I am currently the Vice President of manufacturing for Larry Flynt Publications, Inc. In such capacity, I am the director of production and manufacture of all publications produced by Hustler Magazine, Inc., and Chic Magazine, Inc., each of which is a subsidiary of Larry Flynt Publications, Inc. In my present capacity, I have overall responsibility for the entire manufacturing operation for Hustler Magazine, Inc. and Chic Magazine, Inc. My responsibilities include the assurance of the technical quality of the printed material and pictures appearing in each of the magazines published by the aforementioned corporations (Hustler and Chic) which therefore covers the entire process from purchase of printing paper to printing.
- 2. From May, 1972 to January, 1978, I was employed by Rumford National Graphics, Inc., which is the printer for over 70 different magazines. I served as customer service manager, scheduling manager and account supervisor. In such capacity, I was responsible for overall-customer service and production departments which handle all publication and commercial work, scheduling and manufacturing operations for the entire offset preparation and photo composition departments, the developing and instituting of new

manufacturing systems and production procedures, overall scheduling and coordination of all manufacturing departments, equipment and labor for the manufacturing of the publications on a daily and long-range basis in order to obtain the utmost in economy and productivity while maintaining the publication schedule and quality and liaison between the publication and plant manufacturing to facilitate an economical and graphically acceptable product for the publication.

- 3. From June, 1969 to May, 1972, I was employed by
 McGraw-Hill Publishing Company and worked on the
 Chemical Week Magazine. I was the advertising production
 manager and was responsible for overall inter-departmental
 coordinating, scheduling of the weekly magazine, Chemical Week
 Magazine, and its annual directory.
 - In 1969 I worked for Sid Craiker Studios as photographer.
 - From 1963 to 1965 I worked as a printer for Long Island Press.
- 6. I am therefore well familiar with each of the steps that goes from an undeveloped film to a printed matter in a magazine.

QUALITY OF MAGAZINES

7. I am also familiar with the reputation of the publications of my present employer, including the magazines known as Hustler and Chic. I can state unequivocally that the graphics of these magazines are, and are considered in the industry to be, among the very best in the industry. I use the word "graphics" to include the quality of the paper, color

separation, printing, inks, lamination, assembly and other manufacturing elements of the printed words and pictures as opposed to the content of such words or pictures.

8. Notwithstanding our present superior product, that superiority has been diminished and been made immensely more difficult to attain by reason of Eastman Rodak Company's (hereinafter called "Kodak") recent policy of censorship.

NOTICE

9. Neither I nor to my knowledge anyone else associated with Hustler or Chic has ever approved of Kodak's withholding our developed films or of its notice of intent to do so.

OVERVIEW OF PROCESS

- 10. To understand the significance of Kodak developing, some appreciation of what goes into putting a picture in a magazine must be understood. It is significant to note that Kodak's Reynolds Allinger acknowledges in paragraph 23 of his Declaration that the slides or transparencies are merely "an intermediate step in the publishing process". The first step in the process is acquiring film. The film used for pictures which ultimately appear in Hustler or Chic is paid for and acquired by the magazines themselves and not the photographers. The photographers are then supplied with such film by us for use in taking pictures for our benefit. Thus, the film at all times belongs to us.
 - After purchasing undeveloped film, we then decide upon a general subject matter of an article and in

the case of any article which is to include photographs of live models, the general nature of what the pictures should depict. If the subject matter is to take place in natural settings, then a location must be selected. If the shooting of the pictures is to take place in a studio, then a set must be created. Then the models and photographer must be selected.

- 12. A make-up artist is then hired by us and paid by us.
- 13. In addition, equipment such as strobe lights and flashes and wind machines as well as props must be rented or created. We pay for the travel and lodging of the photographer, the models, the photographer's assistant and the make-up artists.
- 14. Thus, by the time any picture is shot, we have,
 regardless of how the picture comes out, incurred the
 cost of film, the use of a studio, the rental of equipment and
 the rental or creation of props, the cost of a model or models,
 the cost of a make-up artist and the travel and lodging for a
 photographer, a photographer's assistant, a make-up artist and
 model or models.
- 15. With respect to the photographers that we use, we now use and in the past have used only four or five photographers for photographing live models. Regardless of one's taste and regardless of one's views on the content of the pictures taken, still photography of models is an art form and the capability of properly shooting film of models either in natural lighting or artificial lighting which is of a quality that can be subsequently used as a picture in a magazine is a talent not easily acquired. It takes a special talent for a

photographer to place models and props and have models strike pose and assume a facial expression to accomplish the mood the is desired by the publisher just as it takes a special talent for a movie director to obtain the proper expression, action and dialogue from actors. The professional photographers we use are world-renowned artists. They are engaged on a contrabasis and their time is precious to them and to us.

- it is essential to have the transparencies (slides) developed and returned by the next day to have what is known a a "light test". In this fashion it can be determined if the lighting used was proper. The reason it is necessary to have the same back the next day is because immediately after the completion of the project, the sets are destroyed, the models go on to other work and become unavailable and the photographers go on to other work and become unavailable. Thus, the project must be completed in two or three days consecutively. Mr. Reynolds Allinger of Kodak confirms the foregoing in paragraph 17 of his Declaration.
- 17. When dealing with Kodak, we were able to deliver fill after 5:30 in the evening and have it back by 8:30 the following morning. This schedule is essential.
- 18. Hundreds of pictures are shot compared to the number that are ultimately used. After we receive back the transparencies, a photo editing process is gone through by the art director, the publisher, the associate publisher and the photo editor to determine which transparencies might be appropriate for use in connection with the article intended to

be published in the magazine, the size of the pictures to be used and the portions of the transparencies to be included in the printed picture in the magazine. Then a technical edit is done by either the production manager or me or both of us to determine if transparency quality meets standards of our magazines. In addition, text material must be created and properly joined with the pictures for use in the complete article and the various articles must be arranged within the magazine and these steps involve several editorial reviews.

- time in a particular location or studio setting is called a "set". Generally Hustler and Chic have 600 to 900 photographs taken in any one set. Of these 600 to 900 shots only five to nine ever are printed in the article in our magazine for which they were taken. Thus, the percentage of developed transparencies which ultimately appear in one of our magazines is between eight-tenths of one percent and one and one-half percent. Even these percentages must be reduced for proposed articles which are ultimately rejected in the editing processes and for whole sets of photographs which are not satisfactory for artistic or technical reasons or for other reasons are not used in our magazines.
- 20. Following that, the transparencies selected through
 this editing process are sent to the "stat" room
 where black and white enlargements are made to the size
 selected for use in the magazine. The transparencies are
 almost always 35 millimeter transparencies meaning that they
 are approximately one inch by one and one-half inches. The

pictures in the printed magazine are obviously larger.

- 21. Thereafter, the black and white enlargements are pasted on a board called a "mechanical".
- 22. Then the production manager marks technical information on these enlargements to indicate color corrections or other special instructions that should be made in the process known as separating.
- 23. The transparencies and the mechanicals are then sent to the separator. The separator performs the function of extracting the four primary colors (red, yellow, blue and black) on separate films so that the transparency is turned into a material form that can be used by a printer.
- 24. The printer then works from the product created by the separator to finally print the pictures.
 Additional touch-up work can be done during this phase as well.
- 25. It is essential to start with a near-perfect transparency. Defects in this small transparency when enlarged to from 500 to 1600 percent which goes through other generations of film before ultimately being used by a printer, will become even more critical and therefore more noticeable on the printed page.

PROBLEMS UPON NON-RETURN

- 26. We commence the creation process as far in advance as is possible for us to do. Lead time is required at each stage of the process and if additional delays are incurred, extra costs and losses are incurred by the publisher.
 - 27. When Kodak refused to return pictures, the entire series of the pictures taken by the photographer and

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the entire article in which those pictures were going to be used is totally lost. We are then in the exceptionally difficult position of being forced to find a new subject matter and start from scratch, after having already lost the essential time needed to produce the magazine properly. The ignores the dollar loss set forth above. The same problems have arisen when the film was improperly developed by laboratories other than Kodak.

28. Many of the articles are related to the month in which the issue comes out. For example, pictures bearing on Christmas would be irrelevant and not usable in a January issue.

LOSSES FROM NON-KODAK DEVELOPING

- 29. We have been unable to obtain an acceptable alternative to Kodak developing. If we were able to do so, we would gladly do so in order to avoid the loss of time, effort and money involved in this litigation.
- 30. Unfortunately, the alternatives to Kodak developing have been enormously costly and have deteriorated our product.
- 31. Other developing houses are either incapable of or for other reasons do not use the same quality control, equipment, technology, chemistry, trained technicians and other methodology that Kodak does. By reason thereof, we have experienced the following: While it is possible that some films were in fact ruined or lost in the Kodak developing, I have conferred with a half dozen or so other co-workers and none can remember such an instance. In the last year or so,

however, while using other developers: we have experienced frequent ruined developed film; frequently the developed film has been stained; frequently the developed film has scratches on it; frequently the developed film has a red or green or blue overtone; frequently the developed film contains scratches or has a haziness; often times the film is lost by the developer.

- 32. As noted above there has been frequent scratching on the transparencies when received from the developer since we have begun having films developed at non-Kodak laboratories. In addition there has been additional scratching of the transparencies (again only since we have begun using non-Kodak laboratories) during the transmission from us our separator. We have not altered one procedure or safeguard in our transmission to our separator. Therefore, these scratches are caused by the developing process by the non-Kodak laboratories which either contains a softer product or outer surface than the transparencies developed at Kodak laboratories because of the chemicals, use thereof or other reasons.
- 33. Whenever any of the foregoing occurs, we have lost the entire product from the shooting. The models are gone, the sets are gone, if on location the models and photographers have left the location, the photographers are busy with other projects and the time is irretrievable in starting the total process from undeveloped film to printed picture.
- 34. By reason thereof, we are forced to create more potential articles to accommodate those that are ruined simply because the film was not properly developed or

was lost.

- 35. Even if the film is developed, seldom is there an entire series of shots that has the clarity, sharpness or color consistency that we experienced when we were able to use Kodak developing.
- 36. Since using non-Kodak laboratories, we have had transparencies of photography done in natural light returned where something which occupied the entire transparency (such as water) which in fact was of a consistent color throughout has shown up such as green at one place on the transparency and blue on another, and the color at the object has been different on different transparencies shot at the same time. Moreover the color frequently has been incorrect. These problems cannot be cured by color correction in the separating process. This inconsistency and improper color was not experienced when using Kodak developing.
- 37. Our magazines attempt to produce a sharp image on the printed page. Others either strive for or do not mind a diffused image. We have been hampered in obtaining such product since Kodak has refused to develop our pictures.
- 38. Since we have switched from Kodak developing to non-Kodak developing, our separator has repeatedly complained that he is unable to produce the four separated films to his and our standards from the transparencies we provide him with. Additionally, where before he was able to color-correct to enhance the effect desired, he has been hampered because of the lack of quality of the transparency
 - 39. Because the separator's product is poorer, we have

received complaints from our printer that it is not able to provide us with the quality which we demand on the printed page.

- 40. At each stage from the developed picture through the printed page, we are having difficulty because of the poorly developed transparencies, which difficulties were not experienced when Kodak developed our film.
- elsewhere cannot be used. They are being used, but at a sacrifice of quality and at a sacrifice of gross interference with the publishing process because of the wasted time and effort involved in ruined developed film or in lost film or in developed film of such poor quality that the separation process and the printing process become more difficult and time consuming or even impossible.
- 42. While Kodak employees may swear that others are capable of doing as good a work as they are, I have reviewed their affidavits and find it significant that never have they sworn that anyone does in fact produce as good a quality as Kodak for commercial use in a printed page in a magazine as Kodak does.
- 43. I have previously mentioned that the photographers we use in connection with live models are only four or five in number. They have become upset because of the fact that they are paid only on the basis of pictures actually used. Because we have been forced to reject so many more developed transparencies than when we were using Kodak, our photographers have become less onthused about continuing to do

work for us for the following reasons: First, as artists who receive credit in the magazines, they pride themselves on having a good product appear in the magazines and this is essential in order to maintain their reputations; secondly, the economic loss from ruined pictures by non-Kodak developers can be avoided if they work for magazines who do not use live nude models, and therefore can continue to use Kodak developing and thirdly, if they choose to continue in the field of photographing live nude models, they can work for foreign publications and have their pictures developed in Europe BY KODAK where the restrictions they have imposed in the United States do not apply.

44. We, on the other hand, generally must use a laboratory located in Los Angeles although sometimes we are able to use a laboratory elsewhere in the United States for natural lighting location shots. We still need the immediate "turnaround" or overnight return of films or, even where we are able to wait a day or two, we cannot wait the time that it would take to have the pictures developed in Europe.

45. With respect to the scheduling problem (and to avoid any possibility of misimpression) I point out that it is not sound business practice to leave transparencies or any of the other stages of the process from undeveloped film to printed page merely lying around without publication. The process must be kept fresh because anything that lies around is subjected to great risk of being ruined. Thus, it is no answer to say that we should commence our process more months in advance to avoid our scheduling problems. Further, not only

are we physically unable to create additional lead time, it is just not possible to schedule any further ahead than we do. An example of one reason therefor is that one can't shoot outdoor pictures in December for a summer issue depicting a summer scene.

RESPONSE TO KODAK DECLARATIONS

46. With respect to the affidavit of Reynolds Allinger, we do not contend that there are different versions of Kodachrome film designed specifically with the needs of professional photographers in mind. Rather, what we contend is that with some exceptions which are not significant, our

 we do not contend that there are different versions of Kodachrome film designed specifically with the needs of professional photographers in mind. Rather, what we contend is that with some exceptions which are not significant, our photographers use only 35 millimeter cameras and therefore must use 35 millimeter film and that for commercial enlargement of 35 millimeter film, as contrasted with family snapshots, Kodachrome film must be used to obtain an ultimate printed picture of a quality satisfactory to us and generally satisfactory to any magazine that desires to have clear, sharp printed pictures.

- 47. The fact is that those magazines that are engaged in production of quality pictures have traditionally used Kodak developing. Assuming without conceding that other developers are "capable" of doing what Kodak does, the fact is that they do not do so. The quality of non-Kodak processing laboratories regardless of when they began and regardless of what they conceivably could do is not equal to that of Kodak.
- 47.1. It is noteworthy that in paragraph 13 Mr.

 Allinger states that non-Kodak laboratories have the "capability of being able to achieve the same quality of

product" but he follows that not with a statement that they do achieve the same quality of product, because they do not, but rather he says that these non-Kodak laboratories produce work "of a sufficiently high quality that the Kodachrome transparencies they produce can be used to obtain quality color reproductions on magazine pages similar to those of plaintiffs in this action." That is his opinion as to whether or not it is sufficiently high quality. My opinion the opinion of those with whom I work and the view of the industry in general is that the non-Kodak laboratories are not of a sufficiently high quality for us or for anyone else desiring sharp, clear consistent printed color pictures and even Mr. Allinger does not dispute that the quality is lesser with the non-Kodak laboratories.

 47.2. Notwithstanding Mr. Allinger's claims of the merits of Ektachrome film, the fact is that those engaged in the production of magazines which contain pictures including flashtones of any quality prefer and almost universally use Kodachrome when starting with a 35 millimeter transparency which is the most commonly-used size film. The reason for that is that Ektachrome is grainier. In addition, the color tolerances of Ektachrome are more critical; there is less latitude to work with during developing and separating to adjust for color corrections. Moreover, Ektachrome transparencies are not so sharp. When these transparencies are blown up or enlarged, the graininess and the lack of clarity becomes even more pronounced. This is true not only with the Ektachrome X, but with the new Ektachrome E-6.

47.4. With respect to paragraph 20 of Mr. Allinger's affidavit, I dispute that transferring to a piece of Ektachrome duplicating film is a common practice in the publication printing industry. It is not. The additional cost in material and time would be prohibitive. Moreover, even were it a common practice, what Mr. Allinger appears to be talking about is not transferring to a 35 millimeter Ektachrome film, but rather transferring to a totally different sized Ektachrome film whose propensity for graininess and lack of clarity would not be so pronounced since it would not thereafter be re-enlarged. Thus, this suggestion is wholly unrelated to the type of 35 millimeter film selected or the developer thereof selected.

47.5. In response to paragraph 23 of Mr. Allinger's declaration, it may be true that for \$15,000.00 our company could develop a film processing technique for Ektachrome film. It is not true, however, that that technique

would produce the type of transparency we need. Mr. Allinger's "belief" that such installation "would very adequately fill" our needs is just plain wrong. In addition to every other defect in his logic, he fails to consider that developing is a learned technique and not one which can be done by untrained people overnight. It takes years of training just as any other profession takes years of training especially for a magazine which features color pictures.

47.6. In response to paragraph 24 of Mr. Allinger's affidavit, Hustler and Chic could not install processing equipment and receive the type of product that Kodak laboratories produce. Were this true, then the non-Kodak laboratories that exist would be producing the same product as Kodak laboratories produce. It takes more than the mere equipment. Moreover, neither Chic nor Hustler is set up in any way to be a film developer.

47.7. Still dealing with that same paragraph 24, it is ridiculous to suggest that competing magazines could join together to form a developing studio. The scheduling fights alone come to mind so quickly that they dispell any thought that this is a workable solution even assuming that such laboratory could produce acceptable results, an assumption which must be false since we have been unable to find a film laboratory other than Kodak who can produce acceptable results on a consistent basis.

- 48. I respond to some of the points made in the declaration of Oscar Shock as follows:
 - 48.1. I disagree with the statement commencing at page

4, line 8 in paragraph 7 that non-Kodak film processing laboratories have the capability of being able to achieve the same quality of product. First, of course, the statement is only one of capability and not of what is actually the product. Moreover, Kodak experience has placed it in a position that at least to date only Kodak does produce the same quality of product and probably only Kodak has the same capability.

48.2. Like Mr. Allinger, Mr. Shock does not state that the non-Kodak laboratories produce the same quality, but rather he gives his opinion that their work "is of a sufficiently high quality that Rodachrome transparencies they produce can be used to obtain quality color reproductions on magazine pages similar to those of plaintiffs in this action." That statement is false. The product by the non-Kodak laboratories is not of a sufficiently high quality and I suggest that it is not for Mr. Allinger, Mr. Shock or Kodak to determine what quality magazine publishers should have.

48.3. Mr. Shock's statement that a film processing facility "can be run by three properly trained people" is absolutely false. The people that run a film processing laboratory must be properly experienced and that doesn't happen overnight and in any event, I suggest that Kodak does not have the power or right to direct that publishers must now go into the film developing business in order to exercise their freedom of press.

49. I respond to portions of the Declaration of Larry B. Stevenson as follows: 49.1. With respect to the portion of paragraph 11
commencing at page 4 at line 17, I doubt that the
non-Kodak laboratories have the capability since they do not
have the same personnel, but if they have the capability of
producing the same quality, they do not do so and Mr. Stevenson
does not say that they do so.

49.2. Again Mr. Stevenson like Mr. Shock and Mr.

Allinger refers to "sufficiently high quality
that Ektachrome transparencies. . . can be used to obtain
quality color reproductions". Mr. Stevenson is wrong. The
quality is not available. His opinion of what a sufficient
high quality is is not what our opinion is and since we are the
publisher, I assume that our opinion is what counts. Moreover,
I doubt that very many, if anyone, in the magazine publishing
industry concerned with flesh tones graphic arts would state
that Ektachrome transparencies which are enlarged can be used
to obtain the same quality as from a 35 millimeter Kodachrome
transparency.

OWNERSHIP

50. Attached hereto as Exhibit "1" is a photocopy of
Exhibit "1" to the First Amended Complaint in Los
Angeles Superior Court Case No. C 313377. The rolls of film
identified on Exhibit "1" are films which Kodak is
withholding. These films belong to Hustler or Chic and were
paid for by Hustler or Chic regardless of the name of the
customer shown on Kodak's records. It may well be that the
name shown on Kodak's records is that of the photographer, but
the transparencies were paid for by, and belong to, us.

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Numbers 2747 through 2810 thereon identify film shot by James Baes. Order numbers X435465 and X435468 are film which apparently was submitted under the name of Reif. Mr. Robert Reif was then a photographer engaged by us and these films were likewise paid for by us and belong to us. A copy of the notices from Kodak with respect thereto are marked Exhibit "2" and attached hereto.

- 52. Kodak also holds order number X530428 apparently under the name of Mr. Bruce Dawson who in September, 1979 was also one of our photographers. This roll also is a roll purchased by Eustler or Chic and belonging to Hustler or Chic.
- 53. In addition, I have indentified two other rolls of . film and not listed on the Exhibit "1", which apparently were submitted under the name of Mr. Bruce Dawson, which belong to Hustler or Chic and which have not been returned, and they are order numbers 270338 and 270339.
 - 54. The foregoing statements are true of my own knowledge and I am competent to testify thereto.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 1980 at Los Angeles, California.

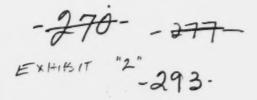


ORDER NOS.:	ORDER NOS.
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Exmist "2

NOTICE . 79-2223	DY 5 5/31/79
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AFFIDAVIT OF ROBERT J. DE MARCO

WASHINGTON)
DISTRICT OF COLUMBIA)

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ROBERT J. DE MARCO, having been duly sworn, states the following:

- From 1973 to 1977, I worked as an assistant photographer taking pictures for use in printed advertising. Thereafter, I went to work for Hustler Magazine.
- In October, 1979, I became employed by U.S. News and World Report as the photo editor where I was hired to set up the introduction of color pictures in that magazine. I stayed there until July, 1980.
- In July, 1980, I became employed by National Geographic and I am the illustration editor for a large book project.
- 4. Since 1977, my employment has entailed involvement with the entire technical aspect of photography from the first step of shooting pictures to the final step of printing the pictures.

KODACHROME VS. EKTACHROME

5. Sometimes a publisher will desire to have a softer or less sharp picture; sometimes a publisher will want a grainy appearance or even improper color casts for a particular effect. There are special circumstances where, such as in the case of U.S. News and World Report, a news story is involved such that greatest possible speed is essential. Sometimes the lighting conditions are so poor that a faster film requiring less light must be used. With regard to speed of developing

there are non-Kodak laboratories in New York City capable of developing Ektachrome film in two hours whereas developing Kodachrome film would take overnight. Ektachrome film is capable of taking pictures in poorer lighting than Kodachrome film. In these special circumstances Ektachrome film will be used by professional photographers instead of Kodachrome. But, the pictures will not be as sharp or clear, the pictures will not have as true a color, and if one desires a sharp, clear, ungrainy, true colored picture, then the quality of the pictures will suffer from the use of Ektachrome film.

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- In professional photography use of 35 millimeter film is the general rule and any other size would be the exception.
- 7. However, both by my own experience and by the reputation in the field, if true color or a sharp picture is desired, then Kodachrome 35 millimeter transparency film (slides) is, if not universally, then almost universally preferred, photographers consistently request Kodachrome film over Ektachrome film, and publishers uniformly request that photographers use Kodachrome film rather than Ektachrome film. Even where professional photography use Ektachrome, unless there be extreme time problems, Kodak laboratories are preferred.
- 8. I am aware of all these facts both by my experience as an assistant photographer and my experience in the publishing process over the last three years.
 - The basic reasons why, absent special circumstances mentioned above, Kodachrome film is preferred to

KODACHROME DEVELOPING

- of the reputation in the industry, I can and do state that in professional photography where 35 millimeter Kodachrome film is used and where a sharp, clear picture with accurate color is desired in a magazine, then absent some unusual factors, Kodak laboratories will be selected for developing. There are several reasons for this.
- 11. First, Kodachrome film developed by Kodak comes back with a greater saturation or in other words, the color is richer than otherwise would be true. The transparency is less grainy and more sharp. The color is truest to real color.
- 12. Hustler Magazine in particular requires Kodachrome film with Kodak laboratory development because it is the policy of the publisher to have sharp, clear pictures with true color on the printed page as opposed to defused, grainy, blurred or improperly colored pictures.
- 13. A significant reason for using Kodak laboratories for developing Kodachrome film is the lack of consistency experienced with other laboratories which is not experienced with Kodak laboratories. I have personal experience in this regard and in all of my years, I cannot recall one incident where a roll of Kodachrome film developed by Kodak came back in an unacceptable form.
 - 14. The very first time that I used another laboratory

while working at Hustler, the rolls of Kodachrome film all came back with significant defects including dirty film with improper color.

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to send in duplicate rolls of film (shot with the same camera at the same time) days apart or weeks apart to Kodak laboratories, the transparencies that are returned would have the same color consistency and hues. If one did so with other laboratories, there could be no assurance that the colors in the first batch would match the colors in the other batches. This is what I mean by inconsistent results with non-Kodak laboratories. Because of the history of the usage by the professionals of Kodak laboratories, non-Kodak laboratories have never gained sufficient business from professional photographers to establish controls equal to those which Kodak has created.

laboratories, I have ascertained that one of the primary reasons why there is such inconsistency with non-Kodak laboratories and consistency with the Kodak laboratories is that the chemicals are more frequently checked and replaced in the Kodak laboratories than in the non-Kodak laboratories and in fact it is a self-perpetuating process. Kodak laboratories specialize in developing Kodak film. Non-Kodak laboratories will receive various kinds of film to develop. Their quantity of Kodak Kodachrome film is therefore smaller than the Kodachrome film which the Kodak laboratories receive. Thus, the volume is greater at the Kodak laboratories and the

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 chemicals are replaced more frequently. There is more frequent testing of the chemicals at Kodak laboratories. The non-Kodak laboratories frequently will be in a position where they do not receive Kodachrome film rapidly enough to use up and replace the chemicals before the chemicals have changed. The freshness or staleness of the chemicals directly affects the color of the transparencies. Use of non-Kodak laboratories therefore incurs a risk of receiving a bad product back when the developed film is returned.

- 17. By reason of the foregoing, other than when speed or poor lighting conditions compelled my use of Ektachrome or other developer, I never recommended, or even considered recommending, anything other than Rodachrome film developed by Rodak laboratories when I was engaged by U.S. News and World Report for setting up the initiation of their use of color pictures in their magazine.
- 18. I know of no professional photographer who, when shooting 35 millimeter film would use anything other than Kodachrome film developed at a Kodak laboratory absent the type of special circumstances I have described above.
- 19. The only reason not to use a non-Kodak laboratory for developing Kodachrome film would be to obtain a cheaper price and in the professional photography field, that increase in price cannot possibly justify the losses and risks entailed in using non-Kodak laboratories.
- 20. In conclusion, if a publisher wants the photographer to produce a 35 millimeter transparency with the best color, saturation and sharpness that can be relied upon as

coming out that way without stains, grainy appearance or dirt on the transparency, I know of no publisher, photo editor or photographer who would use anything other than Kodachrome film developed by Kodak laboratories.

NOTICE

- 21. At no time did I ever tell any representative of Kodak or anyone else that Hustler, Chic, Larry Flynt

 Publications, Inc. or I agreed with Kodak's policy of refusing to return certain developed film or that any of us waived any right or claim against Kodak by reason of such withholding.
- 22. I make the foregoing statements with and from personal knowledge and I could competently testify thereto were I a witness in court.

ROBERT J. DE MARCO

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, on this Aday of August, 1980.

Notary Public

District of Columbia

(Print, type or stamp name here) - EREM 24 T. BANAGE

My commission expires: 13 +3

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

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I, BOB ELIA, state the following:

- 1. From 1976 through 1979, I have been the consultant stylist and set designer for Chic Magazine, I have done illustrations for Chic Magazine, I have been the photo director for Chic Magazine and I have also been in charge of illustrations for record company promotion campaigns.
- 2. In 976 I also did freelance illustrations for Lui Magazine and conducted the publicity campaign for the feature film Le Petit Marcel including poster and newspaper publicity campaign.
- 3. In 1975 I was the art director and script writer for a major motion picture, I served as conception and art director for advertising films produced by Cauchy Productions for Canada Dry and Skansen Beer and worked on the television program entitled Les Routes Du Paradis.
- 4. From 1969 through 1974, I had been in charge of art direction for "Adieu Lindbergh", received first prize at the 1974 Venice Festival for Advertising Films for the advertisement for "L'Express" news magazine, I worked on the concept and direction of advertising movies, I received the All France Medal Award for art direction award for non-advertising publication ("Depeche-Mode"), a fashion magazine, I served as a printing supervisor, lay-out supervisor, photo direction and styling, art direction for fashion magazine, art director for television musical, received the European Advertising Award for

conception and illustration for "O-Bao-Bath Soap" campaign, I was in charge of the concept and illustration for posters, book jackets, record covers, editorial illustrations for magazines Lui and Playboy, both French and American editions, freelance art direction and illustrator, professor at the Ecole Nationale Superieure Des Arts Decoratifs in Paris for four years, did the adaption and art direction for a film presentation of Herman Hess' Sidhartha, worked as set designer, stylist, cartoon editor, consultant art director and illustrator for Lui Magazine and did freelance illustration for Elle and Marie-Claire Magazines.

- Without undue modesty, I can state that I have an excellent reputation in the United States and Western Europe in the professional graphic arts field.
 - 6. I have done work for Chic Magazine since 1976.
- 7. The policy of Chic Magazine has been, and is, to publish color prints of photographs which are of the highest quality, sharpest image and truest and richest color.
- 3. Since Kodak has refused to return some of our pictures, we have been forced to use other laboratories because we could not undertake the risk that what we sent might be confiscated by Kodak.
- 9. Since we have ceased using Kodak laboratories for developing of our film, we have had ongoing and continuous problems. The quality of our finished product has deteriorated. We cannot obtain the correct color scale from non-Kodak laboratories. That means the colors that appear on our transparencies are not the real colors as they appeared in

real life. The color density is less with the transparencies developed by non-Kodak laboratories than it was with the development done by Kodak laboratories. This means that the colors are less brilliant.

10. The transparencies developed by non-Kodak

 laboratories have less latitude. Greater latitude means that there will be better definition or detail in dark areas and the white areas will be more white. The transparencies developd at non-Kodak laboratories show white areas with tinges of color. At expense and great effort, we are sometimes able to compensate for this deficiency but never fully and not always can we do so.

- 11. The transparencies now being developed by non-Kodak laboratories are returned with an overall haze or dullness which was not in existence when we had the transparencies developed by Kodak.
- 12. I state unequivocally that the 35 millimeter transparencies we now receive from non-Kodak laboratories are not of as good a quality as the transparencies we received when we used Kodak.
- 13. On several occasions we have received back developed film only to find that it was completely ruined.

 When this happens there is havor not only because of the money that is lost on the cost of models, rental equipment, props, make-up artist, travel and lodging expenses and other costs, but more significantly, our schedule falls behind which causes enormous disruption.
 - 14. The photographers we use are well-renowned

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photographers because we insist on obtaining the best quality available. It is customary in this industry that photographers are paid (apart from travel and lodging and the cost of the film) only for pictures that are actually used in a magazine.

- 15. The rejection rate of transparencies has risen enormously since we have not been able to use Kodak for developing. This has caused a strain the relationship with photographers
 - 16. We use only four photographers for shooting live models.
- 17. I have records and recollection of repeated instances of transparencies which had to be rejected and therefore the entire shooting effort lost since we have been forced to use non-Kodak laboratories. I have neither records nor recollection of even one such instance while we were using Kodak laboratories.
- 18. Since we have used non-Kodak laboratories, film has even been lost or totally destroyed in the developing process. This never happened while we used Kodak.
- 19. Our scheduling problems are such that we must be able to obtain delivery in Los Angeles the morning after an evening drop-off of studio shot film. We frequently complete a shooting schedule in a studio after 6:00 p.m. and we must be able to have the developed film back by the next day to verify that there is no need to retain the models or the sets.
 - I make the above statements from my own knowledge and I am competent to testify thereto.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 22 1980 at Los Angeles, California.



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DECLARATION OF MATTI KLATT

STATE OF CALIFORNIA) ss.
COUNTY OF LOS ANGELES)

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I, MATTI KLATT, state the following:

BACKGROUND

- From 1968 through 1971, I studied at the Academy of Fine Arts, am Lerchenfeld in Germany; my major was art.
- From 1971 through 1973, I worked as an apprentice
 photographer to Reinhard Wolf, one of the most famous
 and respected photographers in Germany.
- 3. From 1974 through 1976, I worked as a freelance photographer photographing everything from album covers to composites. I also taught school parttime at Kunst and Gewerbeschule, Armgardstrabe, a photography school.
- 4. In 1974 I left Germany and went to work in London as a freelance photographer where I received assignments, among others, from well'known fashion magazines.
 - In 1976 and 1977 I became a photographer for Playboy and Oui where I began photographing nudes.
- Since 1977 I have continued in the field of photographing nudes for Larry Flynt Publications, including Hustler and Chic.

METHOD OF PAYMENT

10. As a photographer, I am paid solely based upon the pictures which ultimately are printed by the person engaging my services. This is a common practice in the industry. As a photographer I incur the risk that the pictures I shoot may not ultimately be used by the publisher.

- 11. In the last year or so, I have had innumerable shooting sessions for Hustler and Chic totally wasted because the developing of the transparencies by non-Kodak laboratories was so bad that the transparencies could not be used.
- 12. In addition, to the extent that pictures which I have taken have been used by Chic or Hustler in the last year or so, when developed by non-Kodak laboratories, the quality has been reduced and this affects my reputation.
- 13. The increase in the percentage of wasted efforts I have undertaken for Chic and Hustler since the film I have shot for them has been developed by non-Kodak laboratories has strained my relationship with Chic and Hustler, although not yet to the point where I would sever my relationship.

KODAK

- 15. Where my client (the publisher in the case of Hustler and Chic Magazines) desires a sharp image with true, rich color and where a hand-held camera is preferred because of the nature of the pictures to be taken, I always recommend and request 35 millimeter Kodachrome film, and developing by a Kodak laboratory.
- 16. In my opinion, for such purposes, Kodachrome film developed in a Kodak laboratory gives the only consistent results and the best quality of pictures. I formed this opinion even before a year ago when Hustler and Chic commenced using a non-Kodak laboratory.

17. I make the above statements from my own knowledge and I am competent to testify thereto.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 25, 1980 at Los Angeles, California.

MATTI KLATT

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DECLARATION OF JAMES BAES

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES)

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26 27 28 I, JAMES BAES, state the following:

BACKGROUND

- 1. I am the son of Emile Baes, internationally well-known painter of portraits and nudes. After I received my baccalaureate degree, I joined the Academy of Fine Arts in Paris in 1955. My work began to be exhibited in Paris in 1958. In that same year I began to work for the United Nations in Rome as design director for one of their specialized publications.
 - During 1962 and 1963, I pursued different independent studied in France and at UCLA in the United States.
- 3. In 1964 I returned to Rome to become the chief editor of one of the specialized publications of the United Nations. I was also a correspondent for Cinema Magazine of the United States.
- 4. In 1965 I was invited to, and did assist in the formation of Playmen, an Italian magazine for which I was also the photgrapher.
 - In 1966 my photographs began to be published in Lui Magazine of France.
 - In 1969 I joined the staff of Stern Magazine and had assignments throughout the world. In just

- During this time, my pictures were also published in the West German magazines Jasmin, Freundin,
 Konkret and Twen.
- In 1972 I was engaged by Lui, Oui, French Cosmopolitan and the French, German and Italian versions of Playboy Magazine.
 - Since 1976, I have been working exclusively in the United States for Hustler and Chic Magazines.

METHOD OF PAYMENT

- 10. As a photographer, I am paid solely based upon the pictures which ultimately are printed by the person engaging my services. This is a common practice in the industry. As a photographer I incur the risk that the pictures I shoot may not ultimately be used by the publisher.
- 11. In the last year or so, I have had innumerable shooting sessions for Hustler and Chic totally wasted because the development of the transparancies by non-Kodak laboratories were so bad that the transparancies could not be used.
- 12. In addition, to the extent that pictures which I have taken have been used by Chic or Hustler in the last year or so, when developed by non-Kodak laboratories, the quality has been reduced and this affects my reputation.

> 27 28

13. The increase in the percentage of wasted efforts I have undertaken for Chic and Hustler since the film I have shot for them has been developed by non-Kodak laboratories has strained my relationship with Chic and Hustler, although not yet to the point where I would sever my relationship.

OWNERSHIP

14. I attach as Exhibits "1" and "2" copies of two separate May 8, 1979 letters I received from Halsey and Griffith, Inc., listing various order numbers of film I submitted to Kodak on behalf of and belong to, Hustler and Chic Magazines. That film was paid for by Chic and Hustler and provided to me by Chic and Hustler and those films are of pictures I shot on behalf of Chic and Hustler.

KODAK

- 15. Where my client (publisher in the case of Hustler and Chic Magazines) desires a sharp image with true, rich color and where hand-held camera is preferred because of the nature of the pictures to be taken, I always recommend and request 35 millimeter Kodachrome film. and developing by a Kodak laboratory.
- 16. In my opinion, for such purposes, Kodachrome film developed in a Kodak laboratory gives the only consistent results and the best quality of pictures. I formed

this opinion even before a year ago when Hustler and Chic commenced using a non-Kodak laboratory.

17. I make the above statements from my own knowledge and I am competent to testify thereto.

I declare under penalty of perjury that the foregoing is true and correct.

E-ccuted on August 26, 1980 at Los Angeles, California.

JAMES BAES, 13

May 8, 1979

Dealer No. 35157 7 Halsey and Griffith, Inc. 313 Datura St. W. Palm Beach, Fl 33401

Customer: J. Baes

Amount Withheld: See Below

These orders were found to contain pictures that cannot legally be delivered to you in person, or to any person representing you, or by any means of transportation.

Please give us permission to destroy them by signing and returning this notice to the address below. If permission is not received from you, they will be held for two years, then destroyed.

EASTMAN KODAK COMPANY Color Print and Processing Services 4729 Miller Drive Atlanta, Georgia 30341

Date				

The pictures described are my property and I hereby authorize you to destroy them.

Signed

	Amount Withheld	File No.
2747 .	Thirty Seven slides	3007
2748	Thirty Seven Slides	3007
2749	Thirty Seven Slides	3007
2770	Seven Slides	
2761	Thirty Six Slides	3007
2771	Thirty Seven Slides	
2772	Eleven Slides	
2773	Thirty Seven Slides	3007
2774	Thirty Six Slides	
2775	Thirty Eight Slides	3007
2765	Thirty Seven Slides	
2754	Thirty Six Slides	3007
2762	Thirty Six Slides	3007
2763	Thirty Six Slides	3007
2767	Thirty Six Slides	3007
2768	Thirty Eight Slides	3007
2769	Twenty Two Slides	3006

EXHIBIT "1" - 312-

Dealer No. 35157 7 Halsey and Griffith, Inc. 313 Datura St. W. Palm Beach, FL 33401

Customer: J. Baes

Amount Withheld: See Below

These orders were found to contain pictures that cannot legally be delivered to you in person, or to any person representing you or by any means of transportation.

Please give us permission to destroy them by signing and returning this notice to the address below. If permission is not received from you, they will be held for two years, then destroyed.

Eastman Kodak Company
Color Print and Processing Services
4729 Miller Drive
Atlanta, Georgia 30341

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Da	ce				

The pictures described are my property and I hereby authorize you to destroy them.

Signed

Order Nos:	Amount Withheld	File No.
2789	Sixteen Slides	3011
2808	Eleven Slides	3011
2785	Thirty Six Slides	3011
2786	Thirty Six Slides	3011
2791	Thirty Six Slides	3011
2792	Thirty Six Slides	3011
2797	Thirty Five Slides	3011
2800	Thirty Six Slides	3011
2801	Thirty Six Slides	3011
2803	Thirty Six Slides	3011
2306	Thirty Seven Slides	3011
2809	Thirty Six Slides	3011
2310	Thirty Six Slides	3011

ALAN ISAACMAN RICHARD D. AGAY COOPER, EPSTEIN & HUREWITZ A Professional Corporation 9465 Wilshire Boulevard, Suite 800 Beverly Hills, California 90212



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Attorneys for Plaintiffs



UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

HUSTLER MAGAZINE, INC., a corporation, and CHIC MAGAZINE, INC., a corporation,)

CIVIL ACTION NO. 80 00561 IH

PLAINTIFFS' JOINDER IN PROPOSED FINDINGS OF FACT

Va.

EASTMAN KODAK COMPANY, a corporation,

Defendant.

Plaintiffs.

Reference is hereby made to the proposed findings of fact lodged by Defendant and served by Defendant. Plaintiffs join in requesting that the Court adopt the following findings of fact:

A. Plaintiffs join in proposed finding of fact No. 2 which recites "Kodak's policy of not returning sexually explicit pictures to customers was formulated unilaterally", it being understood that the words "formulated unilaterally" mean that the same was done without the consent of Defendant's customers and in particular without the consent of Plaintiffs.

B. That portion of proposed finding of fact No. 7 reading as follows: "Kodak's policy of not returning sexually explicit pictures to customers is one which was adopted. . . for the purpose of avoiding. . . Kodak and/or its employees [being] accused of violating the obscenity laws" and therefore pursuant to the compulsion of the laws of the State of California and the United States.

DATED: August 26, 1980

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ALAN ISAACMAN RICHARD D. AGAY COOPER, EPSTEIN & HUREWITZ A Professional Corporation Attorneys for Plaintiff

By 5' RICHARD D. AGAY ALAN ISAACMAN RICHARD D. AGAY COOPER, EPSTEIN & HUREWITZ A Professional Corporation 9465 Wilshire Boulevard, Suite 800 Beverly Bills, California 90212 COPY

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Attorneys for Plaintiffs

in the second

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HUSTLER MAGAZINE, INC., a)
corporation, and CHIC
MAGAZINE, INC., a corporation,)

Plaintiffs.

VS.

EASTMAN KODAR COMPANY, a corporation,

Defendant.

) CIVIL ACTION NO. 80 00561 IE
)
,) STATEMENT OF GENUINE ISSUES

Plaintiffs here set forth the material facts as to which they contend there exists a genuine issue necessary to be litigated:

- Whether Defendants unilateral policy of not returning certain transparencies to its customers constitutes a valid waiver of any of Plaintiff's constitutional or other rights.
- 2. Whether or not any policy adopted by Defendant with respect to the return of developed film to its customers was made pursuant to, under the threat of, under the compulsion of or otherwise by reason of any law enacted by the

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- Whether any policy of Defendant with respect to withholding the developed film belonging to Plaintiffs is legally enforceable.
- 4. Whether or not there are any non-Kodak film processing laboratories available to Plaintiffs which are capable of achieving the same quality of film processing as Defendant's laboratories.
- 5. The additional injuries, damages, costs and other losses which Plaintiffs have been incurring and would have to incur to continue to use non-Kodak film processing laboratories in the United States.
- 6. Whether or not there are non-Kodak film processing laboratories available to Plaintiffs which do achieve a quality of film processing equal to that of the laboratories of Defendant.
- 7. Whether there are film processing laboratories other than Defendant's available to Plaintiffs which do achieve a quality of film processing acceptable to Plaintiffs.
- 8. Whether there are film processing laboratories other than Defendant's available to Plaintiffs which are capable of achieving a quality of film processing adequate for Plaintiffs' purposes.
- 9. The location of film processing laboratories other than those of Defendant which achieve the same quality of film processing as those of Defendant's laboratories and whether or not such locations are equally acceptable to Plaintiffs for their purposes.

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- 10. The speed with which laboratories other than those of Defendant are able to develop films submitted by Plaintiffs.
- 11. Whether or not Defendant's refusal to return developed film to Plaintiffs is intended to or does have in fact an anti-competitive effect.
- 12. Whether or not Defendant's practice in withholding customers' developed films is anti-competitive behavior.
- 13. Whether or not Defendant's policy of refusing to return developed films to customers was adopted for sound business reasons.
- 14. Whether or not the State of California and the United States have, by their statutes, delegated censorship functions to Defendant.
 - 15. Whether or not Defendant has in its possession color transparencies belonging to Plaintiffs.
 - 16. Whether or not Plaintiffs have acted in good faith in commencing this action.
 - 17. Whether or not this action is frivolous.
- 18. Whether or not the policy of Defendant of withholding certain developed films of its customers was agreed upon by Plaintiffs.
- 19. Whether or not Defendant's policy of refusing to return certain films of its customers is a contractual provision, an enforceable contractual provision or an unenforceable contract of adhesion.
 - 20. Whether or not Defendant has monopolized and

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- 21. Whether or not Defendant has pursued service,
 distribution and marketing policies that have
 prevented competing photofinishers from having an adequate
 opportunity to effectively compete for business in the market
 for superior quality developing of film.
- 22. Whether or not Defendant has achieved, and attempted to achieve, its monopolization of the photofinishing business by the advantageous use of its significant power in other areas of the film industry.
- 23. Whether or not Defendant has achieved and maintained a monopoly in the market for superior quality photofinishing.
- 24. Whether or not until 1979 Plaintiffs relied solely upon the developing process of Defendant for the photographs used in Plaintiffs' magazines.
- 25. Whether or not Plaintiffs used Defendant's developing services because of the significantly superior quality of its photofinishing.
 - 26. Whether or not Plaintiffs have been injured by reason of Defendant's conduct and if so, the amount thereof.
- 27. Whether it would be extremely difficult, if not impossible, to measure the damages suffered by

 Plaintiffs as a result of Defendant's refusal to return certain developed films.
 - 28. Whether or not the quality of Plaintiffs' magazines has been substantially lowered by reason of

Defendant's refusal to return developed films.

- 29. Whether or not Plaintiffs' ability to exercise their rights of free speech and press have been irreparably damaged and will continue to be irreparably damaged by reason of Defendant's refusal to return developed films to Plaintiffs.
- 30. Whether or not Defendant's conduct alleged in the Complaint constitutes an illegal prior restraint of free speech and press.
 - 31. Whether or not Plaintiffs are entitled to attorney fees by reason of the conduct of Defendant.
- 32. Whether or not Defendant's superiority in film processing is the result of Defendant's ownership of numerous patents granted by the United States and trademarks registered by the United States and various states.
- 33. Whether or not there is a risk of criminal prosecution under the obscenity laws of the United States or the State of California by reason of Defendant's merely returning the property of Plaintiffs to Plaintiffs and if so, whether the creation of such risk is the delegation by the State of California and the United States of the power and/or responsibility for censoring, by prior restraint, the free speech and press of Plaintiffs.
- 34. Whether the deprivations to which Plaintiffs have been subjected by Defendant have been under the color of the law of the State of California or the United States.
- 35. Whether or not Defendant knows or should know that Plaintiffs publish major magazines distributed throughout the United States.

- 36. Whether or not the developing process of undeveloped film is merely one step in the publishing process and not the final step.
- 37. Whether or not Defendant knows or should know that the developing process of film is merely an initial step in the publication of a magazine.
- 38. Whether or not the mere returning of developed film can subject the developer to criminal prosecution and if so, whether such criminal prosecution effectuates a prior restraint of free speech and press.
- 39. Whether or not Defendant's policy of withholding the developed film of its customers was made for the purpose of censoring or suppressing the publication or distribution of sexually explicit magazines.
- 40. Whether or not Defendant's description of film it refuses to return to its customers is a proper definition of obscene material.

By reason of the foregoing, Plaintiffs object to and oppose each of the conclusions of law proposed by Defendant with the exception of item 8 and as to that item, Plaintiffs merely note that the grant of exclusive patent and trademark rights does make the conduct of Defendant pursuant to federal action, and, to the extent of state trademark rights, does make the conduct of Defendant state action.

To the extent any of the proposed conclusions of law should properly have been denominated a finding of fact,

Plaintiffs assert that there is a genuine issue of fact as to

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each such asserted conclusion of law.

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DATED: August 26, 1980

ALAN ISAACMAN
RICHARD D. AGAY
COOPER, EPSTEIN & MUREWITZ
A Professional Corporation
Attorneys for Plaintiffs

ву 3/

RICHARD D. AGAY

JOHN R. MCDONOUGH J. STEVEN GREENFELD 2 BALL, HUNT, HART, BROWN AND BAERWITZ 450 North Roxbury Drive, Fifth Ploor Beverly Hills, California 90210 4 (213) 278-1960 5 Attorneys for Defendant Eastman Kodak Company 6 7 8

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COOPER EPSTEIN & HUBETHITE AP. G

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HUSTLER MAGAZINE, INC., a corporation, and CHIC MAGAZINE, INC., a corporation.

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) CIVIL ACTION NO. 80 00561 IE

VS.

EASTMAN KODAK COMPANY, a corporation,

Defendant.

Plaintiffs,

KODAK REPLY MEMORANDUM ON

MOTION FOR SUMMARY JUDGMENT

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	DECLARATIONS ESTABLISHED THAT THEY HAVE	
	ANY VIABLE CLAIM AGAINST KODAK UNDER	
	SECTION 2 OF THE SHERMAN ACT RECAUSE	
1	PLAINTIFFS HAVE NOT SHOWN EITHER THAT KODAK	
	HAS VIOLATED SECTION 2 OR THAT PLAINTIFFS	
	HAVE BEEN INJUPED IN THEIR BUSINESS OR	
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	B. Plaintiffs' Injuries, If Any, Were Not	
	Caused by Conduct Which Offends Section 2	
	of the Sherman Act.	6
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	II.	I. PLAINTIFFS CLEARLY DO NOT HAVE A CLAIM FOR RELIEF AGAINST KODAK UNDER SECTION 1 OF THE SHERMAN ACT. II. PLAINTIFFS HAVE NOT ALLEGED NOR BY THEIP DECLARATIONS ESTABLISHED THAT THEY HAVE ANY VIABLE CLAIM AGAINST KODAK UNDER SECTION 2 OF THE SHERMAN ACT RECAUSE PLAINTIFFS HAVE NOT SHOWN EITHER THAT KODAK HAS VIOLATED SECTION 2 OR THAT PLAINTIFFS HAVE BEEN INJUPED IN THEIR BUSINESS OR PROPERTY BY CONDUCT VIOLATIVE OF THE ANTI- TRUST LAWS. A. Plaintiffs Have Not Shown That They Must Use the Services of Kodak. B. Plaintiffs' Injuries, If Any, Were Not Caused by Conduct Which Offends Section 2 of the Sherman Act.

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Attorneys for Defendant Eastman Kodak Company

> UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

HUSTLER MAGAZINE, INC., a corporation, and CHIC MAGAZINE, INC., a corporation,

CIVIL ACTION NO. 80 00561 IH

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KODAK REPLY MEMORANDUM ON MOTION FOR SUMMARY JUDGMENT

vs.

EASTMAN KODAK COMPANY, a corporation,

Defendant.

Plaintiffs,

The papers previously filed by both parties in respect of defendant Kodak's motion for summary judgment are voluminous and cover the issues presented in considerable detail.* Accordingly, this Reply Memorandum will be limited to pointing out the principal fallacies in three of plaintiffs' arguments as to why this case

Defendant's Memorandum of Points and Authorities in support of its motion for summary judgment is cited herein "Kodak First Memo": plaintiffs' memorandum in opposition to the motion is cited herein "Pl. Memo".

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PLAINTIFFS CLEARLY DO NOT HAVE A CLAIM FOR RELIEF AGAINST KODAK UNDER SECTION 1 OF THE SHERMAN ACT.

Plaintiffs' argument that Kodak has violated Section 1 of the Sherman Act (Pl. Memo, pp. 25-28) defies the language of the statute and an unbroken line of authority. It is as elementary as any proposition in antitrust law that unilateral activity by a single business entity cannot be reached via Section 1; there must be concerted action by a plurality of actors in order to satisfy the "contract, combination or conspiracy" element of a Section 1 violation. Harvey v. Fearless Farris Wholesale, Inc., 589 F.2d 451, 455 (9th Cir. 1979); Spectrofuge Corp. v. Beckman

Plaintiffs' response to two of the points made in Kodak's First Memorandum is so unpersuasive as not to require any reply. Accordingly, Kodak will rest upon its earlier argument on these points, which are: (1) if it be assumed that Kodak has been issued patents and trademarks, neither of these facts nor both of them establishes or is evidence that Kodak's actions are "state action" (Kodak First Memo, pp. 58-61) and (2) plaintiffs' "Fourth Cause of Action" does not present a justiciable controversy because there is no concrete adverseness between the parties on this issue. (Id., pp. 65-70.)

Instruments, Inc., 575 F.2d 256, 286 (5th Cir. 1978), cert. den'd.,
440 U.S. 939, 99 S.Ct. 1289 (1979); Six Twenty-Nine Productions,
Inc. v. Rollins Telecasting, Inc., 365 F.2d 478, 484 (5th Cir.
1966).* 1 Von Kalinowski, Antitrust Laws and Trade Regulation,
56.01[2][a], pp. 6-9 to 6-11 (1979).

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Memorandum for the proposition that the requisite "contract, combination or conspiracy" can be found merely from the relationship between a single plaintiff and a single defendant are clearly inapposite. In each of those cases the requisite plurality of actors existed, by reason of a resale price maintenance agreement between a product manufacturer and its distributors, where adherence to the scheme was compelled by the manufacturer's threat of termination or utilization of other coercive methods. In each case the business relationship imposed by the manufacturer upon its product distributors was the means for effecting the price-fixing scheme - involving multiple participants - which was held to violate Section 1 of the Sherman Act.

Plaintiffs allege no price-fixing scheme in their complaint, and none exists. The terms upon which Kodak is willing to process film and return pictures for plaintiffs and others are fixed unilaterally by Kodak and the means by which these terms are enforced do not involve any collaborative effort to

^{*} Cited by plaintiffs for another point at page 47 of their Memorandum.

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II

PLAINTIFFS HAVE NOT ALLEGED NOR BY THEIR
DECLARATIONS ESTABLISHED THAT THEY HAVE ANY
VIABLE CLAIM AGAINST KODAK UNDER SECTION 2
OF THE SHERMAN ACT BECAUSE PLAINTIFFS HAVE
NOT SHOWN EITHER THAT KODAK HAS VIOLATED
SECTION 2 OR THAT PLAINTIFFS HAVE BEEN
INJURED IN THEIR BUSINESS OR PROPERTY BY
CONDUCT VIOLATIVE OF THE ANTITRUST LAWS.

A. Plaintiffs Have Not Shown That They Must Use the Services of Rodak.

Plaintiffs have contrived to create an issue of fact as to whether they "must use" Kodak's film processing services if they are to be able to publish magazines of the exquisite pictorial style and quality of <u>Hustler</u> and <u>Chic</u>. To this end, they have filed declarations which pay glowing tribute to the unique quality of Kodak's service and the processed pictures which the company returns to its customers. Their declarants attest, in effect, that—to adapt a current advertising jingle—"nobody else does it like Kodak can." But what plaintiffs and

their declarants do <u>not</u> tell this Court is how many of the 27 non-Kodak Kodachrome film processors (seven in California) and 107 California "professional" Ektachrome film processors referred to in Kodak's moving papers (Allinger affidavit, 115, 17) plaintiffs or their photographers have used in order to determine whether just <u>one</u> of them might possibly be able to emulate Kodak's superb service. Unless and until plaintiffs show that at least a substantial and representative number of other available film processors have been tried and found wanting, they will not have refuted Kodak's showing, by the declarations of Messrs. Allinger, Schock and Stevenson, that there are non-Kodak film processing laboratories capable of meeting the very demanding artistic requirements which production of plaintiffs' magazines are said to impose.

Moreover, plaintiffs' contention that they "must use"
Kodak's film processing service is belied by the fact that they
have continued to publish <u>Hustler</u> and <u>Chic</u> during the year "last
past" and that "... the graphics of these magazines are ...
among the very best in the industry ... " resulting in a "...
present superior product ... " (Declaration of Al Faer,
¶¶7, 8) While Mr. Faer asserts that the superiority of the
product "has been diminished ... " (¶8), that the product has
"deteriorated" (¶30), and pictures developed by others have
been used "... at a sacrifice of quality ... " (¶41), no
specific facts are adduced in support of these wholly conclusionary statements.

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B. Plaintiffs' Injuries, If Any, Were Not Caused by Conduct Which Offends Section 2 of the Sherman Act.

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The only claims made by plaintiffs of allegedly wrongful conduct by Kodak which has injured plaintiffs are that (1) Kodak has not returned some pictures allegedly belonging to plaintiffs made from film that was sent to Kodak for processing* and (2) Kodak notified plaintiffs that if they send Kodak film which depicts

Plaintiffs assert that pictures made from certain film listed in an exhibit to their state court complaint belong to them and that this fact was known to Kodak and its counsel when Kodak's motion for summary judgment was filed. (Pl. Memo, pp. 3-5.) Yet, plaintiffs acknowledge that the film was sent to Kodak in the names of others (Faer declaration, 9951-53) and nowhere contend that anyone ever notified Kodak or its counsel that plaintiffs claim to be the owners of the film submitted to Kodak in those other names. Kodak has filed and stands upon affidavits stating that the company does not hold any pictures made from film identified in its records as belonging to plaintiffs. (Affidavits of Messrs. Ziegler, Martin, Lynch, Welch, Spiess, Fields, Spillman, Lee, Malder and Elliot.) Counsel hereby state that they do not have and have never had any reason, other than plaintiffs' ex parte! undocumented assertion, to suppose that Rodak may hold pictures or film owned by plaintiffs; hence Kodak has denied that contention. Plaintiffs clearly have the burden of proof on the issue thus joined.

subject matter described in Exhibit A, the transparancies and other products developed from such film (hereinafter collectively "Exhibit A pictures")* will not be returned. Plaintiffs allege

* Plaintiffs argue (Pl. Memo, pp. 20-23) that they should not be held bound by Exhibit B to the affidavit of Norman D.

McClaskey, which is a copy of the provision in the Kodak dealers' catagogue which sets forth Kodak's policy not to return pictures made from film that depicts specifically defined sexual activity. Plaintiffs conveniently fail to mention Exhibit A, a notice delivered to one of plaintiffs' representatives (Fischer declaration, 15), which provides in relevant part:

depicting the following subject matter may subject Kodak to potential criminal prosecution: (a) Ultimate sexual acts, normal or perverted, actual or simulated (b) Masturbation, excretory functions or lewd exhibition of genitals. Film sent to Kodak for processing which depicts such subject matter will not be returned because of the potential legal problems mentioned above.

In this memorandum Kodak will use the term "Exhibit A pictures" as a shorthand expression to describe the type of transparancies and other products which Kodak has a policy and practice of refusing to return to any customer, for the reasons set forth in said Exhibit.

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that these actions by Kodak have injured and will injure plaintiffs "in their business and property in excess of \$10,000".* No other conduct of Kodak is alleged to have caused or has been asserted in plaintiffs' declarations to have caused any injury to plaintiffs. Accordingly, plaintiffs' "FIRST CAUSE OF ACTION" must be summarily adjudged insufficient as a matter of law.

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It is not enough to maintain a private antitrust action for a plaintiff to prove that (1) defendant has violated the antitrust laws in some respect and (2) some conduct or other of the defendant has injured plaintiff in some respect. The plaintiff must also allege and prove that the specific conduct of defendant that caused plaintiff's specific injury was conduct that itself violated the antitrust laws, causing an injury which the antitrust laws are designed to prevent. California Computer Products, Inc. v. International Business Machines, 613 F.2d 727, 732 (9th Cir. 1979); In Re Multidistrict Vehicle Air Pollution M.D.L. No. 3, 481 F.2d 122, 126-29 (9th Cir. 1973), cert den. 414 U.S. 1045, 94 S.Ct. 551 (1975); 13 Von Kalinowski, Antitrust Laws and Trade Regulation, \$\$ 101.01, 101.02, pp. 101-1 - 101-14 (1979). Moreover, plaintiffs must demonstrate that Kodak's conduct was intended to or did have some anti-competitive effect beyond their own loss of business or the loss of a market's competitor. California Computer Products v. IBM, supra, 613 F.2d at 732.

^{*} Plaintiffs do <u>not</u> allege nor do their declarations state in what amount each of them has been injured.

This well-established principle defeats plaintiffs'
"First Cause of Action". The alleged "wrongs" of Kodak of which
plaintiffs complain arise out of the following alleged facts:

(1) plaintiffs sent certain exposed films to Kodak to be processed;

(2) (disregarding Exhibit A) Kodak impliedly contracted to process
the films and return the resulting pictures to plaintiffs; (3)

Kodak failed and refused to return some of the pictures and (4)

Kodak has notified plaintiffs that Kodak will refuse to return

Exhibit A pictures in the future. On these facts the wrongs,
if any, committed by defendant are alleged prior breaches of
contract and/or conversions of personal property and/or threatened
future breaches of contract and/or conversions of personal
property.

Plaintiffs' claims for relief by virtue of these alleged wrongs all arise, obviously enough, solely under state law. If, in the parallel state court action which they have filed, plaintiffs prove these alleged wrongs and Kodak fails to

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establish that its conduct was legally justified, plaintiff may be awarded damages and/or injunctive relief. But proof of those same "wrongs" in this action would clearly not entitle plaintiffs to any relief in this court under the "First Cause of Action" because the conduct complained of does not itself violate either Section 1 or Section 2 of the Sherman Act—and would not do so even if Kodak had monopolized or attempted to monopolize the market for either "commercial color picture photofinishing and developing" (Complaint, par. 5) or "superior quality photofinishing" (Id., par. 6).

In an effort to foist this action upon this Court, plaintiffs have attempted, unsuccessfully, to disguise their state law contract and tort actions as claims for relief cognizable under the Sherman and Clayton Acts. The primary thrust of this effort is plaintiffs' twin contention that (1) Rodak has refused to deal with plaintiffs and (2) such a refusal to deal violates the Sherman Act. Both branches of the contention are wrong.

First, it would not be a violation of the Sherman Act if Kodak, acting unilaterally, were to refuse to deal with plaintiffs or any other customer. As we have shown, Section 1 of the Sherman Act would not be violated because no "contract combination or conspiracy" is involved. Nor would Section 2 be violated (even if Kodak had a monopoly in the relevant market) because such a refusal to deal would not have an anticompetitive effect in the photofinishing market or any part thereof; indeed, its effect

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would be just the opposite: to <u>increase</u> the market share of Kodak's competitors.

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The refusal to deal cases upon which plaintiffs rely (Pl. Memo, pp. 46-49) are clearly inapposite. All arise under Section 1 of the Sherman Act and each involved an agreement between a manufacturer and one or more of his customers, the purpose or effect of which was to deny third parties access to the markets which the customers were exploiting directly and the manufacturer indirectly. Thus, the cases involved anticompetitive schemes, economically beneficial to the schemers, which violated the policy of Section 1 of the Sherman Act that access of competitors to a market not be restricted by agreements deliberately designed to have that very effect.

No such situation obtains here. As has been pointed out, Kodak's policy and practice opens and broadens the seller's side of the photofinishing market. If plaintiffs were granted the relief sought, this Court's judgment would have an anti-competitive effect, by forcing Kodak to accept business that its competitors now enjoy.

Second, Kodak's policy and practice described in Exhibit
A does not constitute or amount to a refusal to deal with plaintiffs or anyone else. Plaintiffs do not allege nor do their
declarations show that Kodak has ever refused to deal with plaintiffs or either of them. The only inference to be drawn from
the record before the Court is that plaintiffs, like any other

Kodak customer, may send exposed film to Kodak for processing and that Kodak will process all such film and return the resulting pictures to plaintiff -- with a single exception: as Kodak advised plaintiffs by Exhibit A. Kodak will not return to plaintiffs (or any other customer) pictures which depict the subject matter described in Exhibit A. This policy and practice is nowise a refusal to deal with anyone; it is, instead, simply the announcement of how Kodak will perform its contract with the customer, i.e., how Kodak will handle or treat certain kinds of pictures which come to its attention in the course of processing film: Kodak will not return those pictures to the customer because doing so may subject Kodak to criminal prosecution. The case is thus similar to Daily Press, Inc. v. United Press International, 412 F.2d 126 (6th Cir. 1969), cert. den. 396 U.S. 990 (1969), wherein the plaintiff contended that defendant had refused to deal with plaintiff but proved only that defendant had refused to grant plaintiff special terms not available to others. Rejecting the contention that defendant had violated the antitrust laws, the court said:

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. . . our case does not even involve a refusal to deal with plaintiff. UPI was willing to deal with plaintiff on the same basis as its other contract customers.

Plaintiff . . . wanted a special deal.

Failure of UPI to give plaintiff a special deal did not operate to create or attempt to create a monopoly. (412 F.2d at 135.)

Unable to show any anticompetitive effect of Kodak's policy in any market in which Kodak competes or aspires to compete, plaintiffs insinuate that there is such an effect in the market in which they compete. To be sure, the complaint does not anywhere allege that plaintiffs' ability to compete in any market has been or will be diminished by Kodak's policy of not returning Exhibit A pictures. Nevertheless, plaintiffs contend in their Memorandum that ". . . the effect of Kodak's confiscation policy is to restrain trade by placing Plaintiffs' (sic) in a reduced competitive position in magazine sales . . . "

(Pl. Memo, p. 28, 2-4). None of plaintiffs' declarations provide any support for this contention.

Plaintiffs do not make clear what "magazine sales" they are talking about, i.e., whether all magazines sold in the United States or only magazines of the <u>Hustler-Chic</u> genre. If the latter, Kodak's policy could not place plaintiffs in a "reduced competitive position" because Kodak treats all such publishers alike, returning Exhibit A pictures to none of them. If the entire "magazine sales" market is meant, plaintiffs present no facts whatever as to how they have fared in that market during the "year last past," as compared to (1) sales in former years or (2) what plaintiffs project their sales during the year last past would have been if the sales appeal of <u>Hustler</u> and <u>Chic</u> had been enhanced by the inclusion in them of pictures made from film processed by Kodak.

In addition to having offered no factual proof whatever that their competitive position has been "reduced" by the impact of Kodak's Exhibit A picture policy, plaintiffs cite no authority to support their novel contention that the incidental effects in remote markets of conduct which does not otherwise offend the antitrust laws makes the actor an antitrust violator. The few cases upon which plaintiffs rely to support their contention (Pl. Memo, pp. 47-50) are clearly distinguisable. In each case the manufacturer defendant had entered into agreements, the specific purpose or intent of which was to restrict competition in the markets in which some of the parties to the agreements competed. Moreover, in each case the manufacturer's purpose was to restrict competition in that market for his (the manufacturer's) own, albeit indirect, economic benefit. Here, that situation simply does not obtain. There is no basis for an inference that Kodak has the slightest interest in the magazine sales market, however defined, much less any financial or other motive or intent to suppress competition therein. And Kodak's policy is against its own economic interest, in that the policy necessarily steers photo finishing business to Kodak's competitors.

The fallacy of plaintiffs' contention that incidental anticompetitive effects in a remote market may cause a business decision, policy or practice to violate the antitrust laws may be illustrated by the following hypothetical examples of such situations:

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1. Manufacturer A moves his plant from 1 State X to State Y: the effect is to 2 3 increase freight costs to A's customer B and thus reduce B's effectiveness 5 as a competitor in the market in which he sells. 6 7 8 2. Manufacturer C decides not to increase 10 11

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- 2. Manufacturer C decides not to increase the size of his plant and his production capacity for a product which he alone produces and which he sells to D and E; the effect is to make it impossible for F to enter as a new competitor in the market in which D and E sell.
- 3. Manufacturer G decides to go out of business because he is losing money; the effect is to deprive one of his suppliers, H, of a major if not critical source of business.*

Surely no one would contend that the antitrust laws compel A to stay in State X, C to enlarge his plant, or G to continue in business.

^{*} Cf. International Railways of Central America v. United Brands Company, 532 F.2d 231 (2nd Cir. 1976), cert. den. 429 U.S. 835.

Thus there is neither authority or reason to suggest that <u>if</u> Kodak's policy did impair plaintiffs' effectiveness as competitors in the magazine sales market (neither alleged nor supported by plaintiff's declaration), that incidental effect would cause the policy to violate the antitrust laws.

If this Court were to assume, arguendo, for purposes of deciding the pending motion, that Kodak has a monopoly posit in the "superior photofinishing market" and that Kodak's Exhibit A pictures policy constitutes a refusal to deal with plaintiffs the question then presented for decision would be: does this assumed monopolist's refusal to deal with these plaintiffs constitute a violation of the antitrust laws? That hypothetical question must be answered in the negative.

The question ". . . under what circumstances does a monopolist have a duty to deal?" is thoroughly analyzed in the opinion of Circuit Judge Keith in Byars v. Bluff City News Co., Inc., 609 F.2d 843, 846 (6th Cir. 1979). Judge Keith's analysis makes clear that in some situations a monopolist may have a duty to deal, but that these situations are limited to cases in which the monopolist's refusal to deal has the purpose or effect of restricting competition in a market in which the monopolist hims

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To the same effect see Ace Beer Distributors, Inc. v. Kohn, Inc., 318 F.2d 283,286-87 (6th Cir. 1963) ("A refusal to deal becomes illegal under the [Sherman] Act only when it produces an unreasonable restraint of trade, such as price fixing, elimination of competition or the creation of a monopoly . . . The fact that a refusal to deal with a particular buyer without more, may have an adverse effect upon the buyer's business does not make the refusal to deal a violation of the Sherman Act"); Daily Press, Inc. v. United Press International, 412 F.2d 126, 134 (6th Cir. 1969) cert. den. 396 U.S. 990 (1969) ("It is settled that mere refusal to deal is not a violation per se of Section 2"); Bushie v. Stenocord Corporation, 460 F.2d 116, 120 (9th Cir. 1972) ("Unless the manufacturer used his natural monopoly to gain control of the relevant market in which his products compete, the antitrust laws are not violated"); International Railways of Central America v. United Brands Company, 532 F.2d 231, 239 (2d Cir. 1976) cert. den. 429 U.S. 835 (1976) (". . . in order to establish such a section 2 violation, the plaintiff must establish that the defendant had a deliberate or willful purpose to exercise monopoly power. . . Monopoly power is well understood as '"the power to control prices or exclude competition"'"); Mid-Texas Communications Systems, Inc. v. American Telephone and Telegraph Company, 615 F.2d 1372, 1389 (5th Cir. 1980) (". . . as a general principle, section 2 prohibits only those refusals to deal which under the particular circumstances of a case are unreasonably anticompetitive. Byars, supra ")

that mere possession of monopoly power is not illegal and that

Section 2 of the Sherman Act is violated only if ". . . a monopolist abuses its monopoly power and acts in an unreasonably
exclusionary manner vis-a-vis rivals or potential rivals . . ."

(609 F.2d at 853) (emphasis added) He also observed that "As
preservation of competition is at the heart of the Sherman and
Clayton Acts, a practice should be deemed 'unfair' or 'predatory'
only if it is unreasonably anti-competitive. In a Section 2 case,
only a thorough analysis of each fact situation will reveal
whether the monopolist's conduct is unreasonably anti-competitive
and thus unlawful". (citing cases in which the monopolist's conduct was designed to eliminate competition in markets in which
the monopolist competed or desired to compete) (609 F.2d at 860).

Judge Keith analyzed the decided cases in which monopolists have been held to have a duty to deal as falling into four categories: (1) a monopolist uses its monopoly power in one market to distort competition in another market by refusing to deal (citing cases in which the monopolist was or desired to be a competitor in the latter market); (2) a monopolist refuses to deal with customers who deal with its rivals ("This behavior is inherently anti-competitive"); (3) a group of competitors who control an indispensable facility refuse to give their competitors equal access to the facility; and (4) a monopolist seeks to integrate vertically, thus reducing or eliminating competition in a market in which the monopolist competes or desires to compete (609 F.2d at pp. 857-858.) This case does not fall within any of of these categories.

Nothing in Judge Keith's opinion or in the cases he cites suggests an action taken by a monopolist for valid business reasons and which does not have an anti-competitive effect in the markets in which the monopolist himself competes or intends to compete would constitute a violation of Section 2 of the Sherman Act merely because the action might have an incidental anti-competitive effect in a remote market in which the monopolist has no economic stake or interest. That, of course, is the situation before this Court if Kodak is assumed to be a monopolist, if the Company's Exhibit A pictures policy is assumed to amount to a refusal to deal with plaintiffs and if such refusal to deal is assumed to have an anti-competitive effect in the "magazine sales" market.

Finally, plaintiffs while attempting to distinguish the cases most nearly in point, have failed to do so. These are the cases which held that newspapers alleged to have individual or combined monopoly positions in their markets could decline to publish sexually explicit materials which the plaintiffs in the respective cases submitted for publication. These cases, cited and discussed at pp. 52-54 of Kodak's First Memo, are America's Best Cinema Corp. v. Ft. Wayne Newspapers, Inc., 347 F. Supp. 328 (N.D. Ind. 1972) (newspapers not required to display advertisements of "x-rated" and "adult" movies submitted by plaintiff to exhibitors); Associates & Aldrich Company, Inc. v. Times Mirror Company, 440 F.2d 133 (9th Cir. 1971) (newspaper having monopoly position not required to accept movie advertisements without editing of sexually suggestive material); Adult Film Association of America v. Times Mirror Company, 97 Cal.App.2d 77, 158 Cal.

Rptr. 547 (2d Dist. 1979) and <u>Alpha-Sentura Business Services v</u>.

<u>Interbank Card Association</u>, 1979-2 Trade Cases ¶62,960 (D.C.

Md. 1979).*

III

KODAK'S POLICY OF WITHHOLDING EXHIBIT
A PICTURES IS NOT STATE ACTION; IF
IT WERE, KODAK'S POLICY DOES NOT
CONSTITUTE CENSORSHIP OF PLAINTIFFS'
ACTIVITIES OR PUBLICATIONS.

A. Kodak's Policy is not State Action.

Plaintiff contends that Kodak ". . . appears to be attempting to ride the horse in two directions at the same time. First it claims its policy was adopted under compulsion of state and federal laws and then it claims that its policy had nothing to do with state or federal laws." (Pl. Memo, pp. 55, 11. 19-23). Plaintiffs obviously do not understand and thus have confused two separate points that Kodak made in its First Memorandum, viz:

First, as shown by the affidavit of Norman D. McClaskey, in adopting its policy in respect of Exhibit A pictures Kodak acted unilaterally, i.e., not in concert, partnership or collaboration with, or at the request or instigation of, any federal or

^{*} See also a case not previously cited, Homefinders, Inc. v. Providence Journal Co., 621 F.2d 441 (1st Cir. 1980).

state official; nor did Kodak act to further the social policies reflected in obscenity laws, or as a "volunteer policeman" to see that those laws are enforced against plaintiffs or anyone else.

Second, Kodak adopted its policy only to protect its own interest, i.e., solely because Kodak fears that returning the pictures might subject Kodak and/or its employees to the risk of being criminally prosecuted for violating constitutionally valid state and federal obscenity laws. In adopting the challenged policy Kodak's officers acted solely as business executives and not as either adjunct government officials or moral crusaders.

Because this is so, it is wholly irrational to assert that the adoption by Kodak of its Exhibit A pictures policy constituted "state action" within the meaning of 42 USC \$1983 and/or the First and Fourteenth Amendments to the United States Constitution. To hold that policy to be "state action" would place Kodak in this "catch 22" dilemma: if Kodak disobeys the federal and state obscenity statutes by returning Exhibit A pictures to customers, the Company risks having to defend itself and its employees against federal and/or state criminal prosecutions; "if Kodak obeys the statutes, the Company risks the filing of this action and others of like character (some already filed elsewhere). In either event, Kodak must incur heavy legal expense, disruption of normal business activity, and the risk of a costly and/or punitive outcome in the actions brought against

^{*} A film processing laboratory employee was so convicted in Gold v. United States, 378 F.2d 588 (9th Cir. 1967).

the Company. To place Kodak in such a situation - i.e., "in the 1 2 middle" between plaintiffs and law enforcement authorities, the 3 true antagonists in the pornography field - would be nothing short of monstrous. Neither Adickes v. S.H. Kress and Company, 398 U.S. 144, 90 S.Ct. 1598 (1970), nor Doe v. Charleston Area Medical 5 Center, Inc., 529 F.2d 638 (4th Cir. 1975), compels that result 6 7 becuase in both of those cases the state custom or statute relied upon by the defendants was unconstitutional under prior decisions, 8 whereas the obscenity statutes with which Kodak seeks to comply 9 pass constitutional muster under Miller v. California, 413 U.S. 10 11 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973); Hamling v. United States, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974); and Bloom v. 12 13 Municipal Court, 16 Cal.3d 71, 127 Cal.Rptr. 317, 545 P.2d 229

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(1976).

B. Kodak's Policy Does Not Constitute Censorship of Plaintiffs' Publications.

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19 Plaintiffs contend that Kodak's refusal to return 20 Exhibit A pictures constitutes "censorship" vis-a-vis plaintiffs. Pl. Memo, pp. 5, 13, 15-16, 67-69. The contention is without foundation in the record.

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* The Circuit court held that there was an alternate bases for a finding of state action in the Doe case and in the Adickes case it appeared that the defendant willingly complied with the state command to discriminate, rather than acting to avoid the risk of criminal prosecution.

Plaintiffs' baseless "censorship" charge assumes, without a scintilla of supporting evidence, that the reason Kodak withholds Exhibit A pictures is to prevent plaintiffs from publishing magazines containing the pictures because Rodak deems such pictures unfit for publication. If this were true, Kodak's policy might conceivably be akin to censorship. But what plaintiffs contend is plainly not true: as shown by the affidavit of Norman D. McClaskey, Kodak does not act for the purpose of restricting plaintiffs' publishing activities but solely to avoid the risk of criminal prosecution of the Company and/or its employees--prosecution that would be based upon the very act of returning Exhibit A pictures, without reference to the use plaintiffs might have made of the pictures if they had been returned. The McClaskey affidavit makes it clear that Kodak has no interest in what plaintiffs publish; the business policy reflected in Exhibit A is simply one of trying to stay out of trouble with law enforcement authorities. And plaintiffs are not in fact "censored", i.e., precluded from publishing their magazines, as shown by their admission that they are currently publishing what is, by their own most demanding critical and artistic standards, a "present superior product". (Faers affidavit, ¶8.)

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Because Kodak's policy and practice does not involve censorship, plaintiffs' lengthy discussion of "prior restraint" cases (Pl. Memo, pp. 10-19) is wholly beside the point. So is plaintiffs' argument (Id. at page 4; Faer affidavit, 1418, 19) that Kodak's alleged censorship is both premature and unjustified because Kodak has no way of knowing whether particular pictures

will be used in plaintiffs' publications, or how they will be modified if they are used, or what redeeming social value plaintiffs' publications may have to offset their pervasive pictorial display of human genitalia.*

On the other hand, it is clear that what plaintiffs demand Kodak return to them are the pictures themselves and alone, without modification or accompanying text to consider in determining whether they fall within the reach of federal or state obscenity laws. In a prosecution of Kodak and/or its employees for violation of those laws, all that would be before the trier of fact would be the Exhibit A pictures themselves, unedited and without ameliorating context.** It would be no

^{*} If Kodak's Exhibit A picture policy did involve both state action and interference with publication of plaintiffs'

"message", it would not offend the Constitution. Lehman v.

City of Shaker Heights, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.

2d 770 (1974) (refusal of city transit system to sell advertising space on public busses to political candidates, while constituting state action, was within management's discretion to make reasonable choices as to advertising to be displayed); cf. Public Utilities Commission v. Pollack, 343 U.S. 451, 72 S.Ct. 813, 6 L.Ed. 1068 (1952).

^{**} Transportation of unedited obscene film in interstate commerce is a federal offense. United States v. Levine, 546 F.2d 658, 667 (5th Cir. 1977).

defense in such a criminal action to show that after the pictures were returned by Kodak to these plaintiffs, they did not use the pictures, or that before publication they eliminated obscene parts of the pictures, or that the issues of <u>Hustler</u> or <u>Chic</u> in which the pictures appeared, contained sufficient material of redeeming social value to cause the magazines, taken as a whole, to comply with constitutionally valid obscenity laws.

IV

THE LOGICAL FAMIFICATIONS OF PLAINTIFFS' POSITION DEMONSTRATE ITS INVALIDITY.

Analyzed in terms of its logical ramifications, plaintiffs' assertion that they are entitled to have this Court command Kodak to return Exhibit A pictures to them is clearly without merit. Were their position in this case to be upheld, it would logically follow that plaintiffs, wrapping themselves in the antitrust laws, Section 1983 and the First Amendment, could similarly utilize this Court to conscript or commandeer the services of other business enterprises that declined to serve plaintiffs on plaintiffs' terms—e.g., a supplier of magazine printing stock, a magazine printing plant, a contract carrier, an advertising agency, or a magazine wholesaler or retailer. Against their wishes to the contrary, any or all of these, too, would be compelled by judicial decree to respond to plaintiffs' assertion that such defendants' services or products are so unique

that plaintiffs "must use" them to publish and market Hustler 1 2 and Chic. To this demand there would be no legal defense, 3 whether of business judgment, of a defendants' concern about possible prosecution as an aider and abettor in plaintiffs' 5 publication of obscene material, or the claim of a right to 6

exercise sheer personal preference in selecting one's customers.

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That the assertion of a legal position having such ramifications is errant nonsense is clear, on the bases not only of principle but of authority: in Associates & Aldrich Company v. Times Mirror Company, 440 F.2d 133 (9th Cir. 1971) the Court of Appeals for the Ninth Circuit, holding that the monopolist defendant in that case was not under a constitutional, statutory or other duty to publish advertisements as submitted by plaintiff movie exhibitors, said (at page 135):

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Even if state action were present, as in an official publication of a statesupported university, there is still the freedom to exercise subjective editorial discretion in rejecting a proferred article.

> "The right to freedom of speech does not open every avenue to one who desires to use a particular outlet for expression. On the contrary, each particular avenue for expression presents its own peculiar problems. * * *

> > -26-

1 Avins v. Rutgers, State University of
2 New Jersey, 385 F.2d 151, 153-54
3 (3d Cir. 1967), cert den. 390 U.S.
4 920, 88 S.Ct. 855, 19 L.Ed.2d 982
5 (1968).
6
7 In Avins the Court of Appeals for the Third

In <u>Avins</u> the Court of Appeals for the Third Circuit also said:

Nor does freedom of speech comprehend the right to speak on any subject at any time . . .

As this court said in McIntire v. Pm. Penn

Broadcasting Co. of Philadelphia . .

"True, if a man is to speak or preach he must have some place from which to do it.

This does not mean, however, that he may seize a particular radio station for his forum . . ."

Thus, one who claims that his constitutional right to freedom of speech has
been abridged must show that he has a right
to use the particular medium through which
he seeks to speak. This the plaintiff has
wholly failed to do . . . no one doubts
that [plaintiff] may freely at his own
expense print his article and distribute it
to all who wish to read it. However, he does

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not have the right, constitutional or other-1 wise, to commandeer the press and colums of the 2 Rutgers Law Review for the publication of his article '. . . (385 F.2d 151, 153). CONCLUSION 7 For the reasons set forth above and in the papers 9 initially filed in support of Rodak's motion for summary judgment, 10 the motion should be granted. 11 12 Dated: September 2, 1980 13 14 Respectfully submitted, 15 JOHN R. McDONOUGH J. STEVEN GREENFELD BALL, HUNT, HART, BROWN AND BAERWITT 16 17 18 Attorneys for Defendant 19 Eastman Kodak Company 20 21 22 23 24 25 25 27 28

(VERIFICATION - 464 2015.5 C.I

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HONORABLE IRVING HILL, CHIEF JUDGE PRESIDING

HUSTLER MAGAZINE, INC., et al.,

Plaintiffs,

EASTMAN KODAK COMPANY,

Defendant.

CV 80-561-IH

Onla In Ber

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Monday, September 22, 1980

XAVIER MIRELES, CSR Federal Court Reporter 419 U.S. Courthouse 312 North Spring Street Los Angeles, California 90012

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IN	THE	UNIT	CED	STATES	D	ISTRICT	COURT
	CEN	TRAL	DIS	STRICT	OF	CALIFO	RNIA

EUSTLER MAGAZINE, INC., et al., Plaintiffs, v.

CV 80-0561-IH

EASTMAN KODAK COMPANY, Defendant.

CERTIFICATE

I hereby certify that I am a duly appointed, qualified, and acting Federal Court Reporter of the United States District Court for the Central District of California.

I further certify that the foregoing ____44__ pages are a true and correct transcript of the proceedings had in the above-entitled cause on Monday, September 22, 1980. and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 29th day of September , 19 80 .

XAVIER MIRELES

Federal Court Reporter

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For the Plaintiff Hustler:

COOPER, ESPTEIN & HUREWITZ
BY: RICHARD D. AGAY
VICTOR VITLIN
\$455 Wilshire Boulevard, 800
Beverly Hills, California 90212

For the Defendant:

Appearance .:

BALL, HUNT, HART, BROWN & BAERWITZ
BY: JOHN R. McDONOUGH
J. STEVEN GREENFELD
450 North Roxbury Drive
Beverly Hills, California 90210

LOS ANGELES, CALIFORNIA; MONDAY, SEPTEMBER 22, 1980; 3:00 P.M.

THE COURT: Good afternoon, gentlemen.

Call the case, Mr. Clerk, but let me get my calendar in shape here first.

Go ahead.

THE CLERK: Item 8, CV 80-0561-IH: Hustler Magazine, Inc., et al., v. Eastman Kodak Company.

Counsel, announce your appearances, for the plaintiff first.

MR. AGAY: Richard D. Agay and Victor Vitlin, of Cooper, Epstein & Hurewitz.

THE COURT: Which of you gentlemen will handle the argument?

MR. AGAY: I will, Mr. Agay, your Honor.

THE COURT: All right.

MR. McDONOUGH: John R. McDonough and Steven Greenfeld for the defendant Eastman Kodak Company.

THE COURT: Are you going to handle it, Mr. McDonough?

- MR. McDONOUGH: Yes, I will, your Honor.

THE COURT: Okay. In this case, plaintiffs are publishers of two national magazines, Hustler and Chic.

They sue defendant Eastman Kodak under the antitrust laws and various Civil Rights and constitutional provisions of law.

They allege Eastman refuses to process and deliver

color film which the magazines have given to Eastman for processing and delivery.

Somewhere in the papers, a little is made that the film is owned by the magazines who give the film to photographers; and I don't know whether these photographers are employees or independent contractors. The photographers take the pictures, and the photographers go to Eastman for development of the film and apparently printing the film, and give Eastman Kodak the film under their own names, meaning the photographer's name; is that right, Mr. Agay?

MR. AGAY: Yes, your Honor.

Although there are also instances where the film is given to Kodak under the company name. I don't think any of these particular films were given under the company name.

THE COURT: And those photographers are, in your view, what? employees? or independent contractors?

MR. AGAY: They would be independent contractors, but the film as we alleged remains ours at all times.

THE COURT: Okay. The motion before me filed June
30 is denominated as a Motion for Summary Judgment.

In some aspects where facts are not involved, it could have been brought and denominated as well as a motion to dismiss. It might be that in my discussion of the various aspects of the motion, some aspects will be treated

as a motion ω dismiss; and I will try to delineate such aspects as I get to them; but there is no doubt that in many aspects, this is a true summary judgment motion; so I want to follow my normal practice of listing the evidence to make sure I have not overlooked any.

The evidence for the defendant moving party is as follows: We have an affidavit from Mr. McClasky; a declaration of Mr. Fisher in Eastman Kodak Customer Service; an affidavit of Mr. Allenger; an affidavit of Mr. Shock; a declaration of Mr. Stephenson.

Defendants have filed copies of plaintiffs' magazines, at least one copy of each.

We have a group of affidavits from some of the defendants' laboratory managers saying that they can't find any film belonging to Hustler or Chic that has been retained by Eastman.

On this small subject, there may well be a conflict of material fact because the magazines -- the plaintiff says that film belonging to the magazines has been retained by Eastman, and Eastman responds by saying that they cannot find the film under the photographers' names.

So I think we have a conflict of fact, but that conflict is irrelevant to the issues that are raised by this motion.

I am going to assume for the purpose of all issues

that are discussed and decided today that defendant Eastman, as alleged, has retained and refused to deliver the processed version of the films that plaintiff has left them, with ... Eastman, for developing, and has refused to return even the negatives.

Now, let me check with you, Mr. McDonough, have you listed all the evidence?

MR. McDONOUGH: Yes, I have, your Honor.

And we accept that assumption that the film belongs to them.

THE COURT: Very good.

Now, for the plaintiffs respondents, I have the following evidence: A declaration of the Vice-President, Mr. Faer, F-a-e-r; and an affidavit of Mr. DiMarco, one of the photographers.

MR. AGAY: Excuse me, your Honor. He was not one of the photographers. He was Production Chief, I believe it was.

THE COURT: He is not a photographer?

MR. AGAY: No. He is a former employee.

THE COURT: Former what? production chief?

MR. AGAY: May I look at his affidavit?

THE COURT: Sure. I don't mind.

I thought I had it right.

MR. AGAY: I'm sorry.

THE COURT: He says, "I worked as an Assistant Photographer."

MR. AGAY: That was during this period; then it says, "Thereafter, I went to work for Hustler Magazine," and I don't know exactly what his title was.

I think there is an affidavit by the plaintiffs which attributes a title to him.

THE COURT: Well, if you look at the first paragraph, you will see what threw me off.

MR. AGAY: Yes. It is ill-organized.

THE COURT: He doesn't tell who he worked as an Assistant Photographer for.

MR. AGAY: Right.

THE COURT: Do you think he did not work for .
Hustler as an Assistant Photographer?

MR. AGAY: I know he didn't. I am just trying to figure out exactly what his title was, but I know that it wasn't an Assistant Photographer.

THE COURT: All right. Let's not characterize it by title.

Continuing: After DiMarco, we have a declaration of Mr. Elia, who was the Photo Director.

We have a declaration of Mr. Clatt, C-1-a-t-t, another photographer; declaration of Mr. Baes, another photographer.

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Is that all the evidence, Mr. Agay? MR. AGAY: Yes, your Honor.

THE COURT: All right. Now, before I get to this, ." I note that there is now going on in state court an action between the same parties; and I gather that means it is brought by both magazines, Hustler and Chic, to get their negatives and/or developed pictures back.

The action is in the nature of conversion and

I know the number of the case. You furnished that to me. It is LASC case No. C 313377. I do not know the title of that case. I assume that it was filed before the federal court case was filed.

Can you straighten me out on those matters? MR. AGAY: As to the title, it would be identical except there would be some DOES added to the defendant list.

THE COURT: So it's Hustler Magazine and Chic Magazine v. Eastman?

MR. AGAY: Right.

And as to the date of the filing, I don't have that with me, but I would suspect that it was filed about the very same day.

THE COURT: Very well. All right.

I note that action because it seems to me that it will necessarily involve, many of the contract issues

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involved in this federal case and may set up a collateral estoppel or res judicata bar.

All of this is principally stated. I now want to return to what I believe are the problems that are posed by this motion.

I think the motion poses problems that break down into four subdivisions; and the first is the Sherman Act, Section 1. That is included in the First Cause of Action, although the First Cause of Action is broader than the Sherman one alone.

The second problem is the Sherman Act, Section 2, which is always part of the First Cause of Action.

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The third problem is the question of the State action as involved in Causes of Action 2 and 3; and the fourth problem is the declaratory judgment prayer set up as a separate Cause of Action in Cause of Action No. 4.

Those are the subdivisions as they appear to me.

I will discuss them separately, hear argument on each after

I have indicated my tentative decision.

Let's go right to Sherman, Section 1.

Section 1 of the Sherman Act makes unlawful any contract, combination, or conspiracy in restraint of trade.

So far as I can see, this case involves no combination and no conspiracy. None can be alleged, and none has been alleged; so we are left with the question of contract. In a minute, I am going to ask you, Mr. Agay, to outline the nature of the alleged contract; but before I do, I want to say one thing on a different subject.

The defendant has contended that there can be no Section 1 liability unless there is what defendant calls a multiplicity of actors on the defense side of the case.

I think the defendant relies here on some language in the Supreme Court that was, when it was uttered, less than careful on the part of the court, and that the court is against this contention.

I believe a single actor can violate Section 1.

There has to be a contract between actor and the plaintiff or someone else of which the plaintiff can take advantage, but there is no requirement under Section 1, as I understand the law, for a multiplicity of actors.

Mr. Agay, come up now, if you don't mind, and describe to me the essentials of the contract that you think exists between plaintiffs and Eastman that give you an access to Section 1 of Sherman.

MR. AGAY: I don't believe there is a contract
between the plaintiffs and Eastman Kodak that gives rise to
a Section 1 claim. The contracts to which we refer are contracts
that Eastman Kodak makes with others.

We are not sure of exactly who all of those others are THE COURT: What others?

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it --

MR. AGAY: Developers. Other developers, competitors.

THE COURT: You mean other people who give them

film to develop?

MR. AGAY: No. No. No. Other laboratories who are working under license agreements granted by Rodak.

THE COURT: Oh, you lost me. I don't see any sign of that in the Complaint. Is that in there?

MR. AGAY: I was trying to find the exact portion, your Honor. I am not certain that it is well pleaded.

THE COURT: I may have missed this. This comes to me, not only as a startling thing, but also almost shocking.

Let me turn to the Complaint, and let's see if there is even an intimation of that in here.

Hold on. Hold on.

All right. The Complaint was filed February 13. I have it.

Pirst Cause of Action is Sherman I. Where is that?

MR. AGAY: I may have been overly restrictive.

There is a contract conceivably -- never mind. I am sorry,
your Honor.

I don't think -- I confess, I don't believe the Complaint is well pleaded for that particular element.

I think that --

THE COURT: If I gave you the opportunity to replead

MR. AGAY: Your Honor, if I could just --

THE COURT: Hold on one second.

Describe the contract you would rely upon, and how it violates Section 1 of Sherman, and the way it gives you rights.

MR. AGAY: The contract or contracts between defendant and competing laboratories by virtue of which they obtain chemicals and/or licensing of equipment upon which Kodak has a patent restricts our ability -- that is, plaintiffs' ability -- to obtain quality pictures.

THE COURT: Well, I know that under Section 2 of

Sherman you contend that Eastman has uniquely the best service
so that you are deprived of that service. You ought to make

that a separate market. We will get to that.

Let me have this other again, the contract.

MR. AGAY: We have not, of course, conducted any discovery, but we believe that each one of these competitors operates to the extent --

THE COURT: Now, "competitors" are people who also develop color film for the public; is that right?

MR. AGAY: Right.

THE COURT: Go ahead.

MR. AGAY: They operate to the extent they develop codachrome color film through the patents and licenses of the patent -- granted the licenses that is granted by Kodak.

THE COURT: Just Kodachrome? not Ektachrome?

MR. AGAY: It doesn't make any difference what it is, but Kodachrome is the only film that we are involved with in that case.

Those contracts we believe are contracts that will be violative of Section 1. It is to those contracts that we refer.

I should say: Those are the contracts that we would refer.

THE COURT: These are contracts with other photofinishing laboratories that somehow that restricts them in some fashion?

MR. AGAY: Yes, your Honor.

MR. AGAY: The effect is that we are unable to get pictures developed by others of equal or acceptable quality.

THE COURT: That is the same monopolization charge that you made under Section 2, isn't it?

MR. AGAY: Right. The damage is the same. The charge is different.

THE COURT: We are going to take a brief recess.

(Brief recess.)

THE COURT: Mr. McDonough, would you come to the podium.

MR. McDONOUGH: Yes, sir, your Honor.

THE COURT: Were you as surprised as I at the dimensions of the Sherman 1 claim, or did you understand that was the Sherman 1 claim?

MR. McDONOUGH: No. I have to confess that I was equally surprised, your Honor; and it seems to me that counsel has really acknowledged that we both should have been surprised. He has said that it was not well pleaded. As I understand him, he said that, given the opportunity, he would allege the existence of some agreements which he says may exist between Kodak and some other laboratories. He doesn't apparently have a shred of evidence in his hands or in his possession that any such agreements do exist. He hasn't, apparently, made any investigation or asked anybody whether they do exist; and what I think he is asking this court to let him do is this: To allege that they do exist and engage in a large program of discovery to see if he can turn up out of our files or somebody else's some such agreement, and I don't believe that it was anywhere signaled in his Complaint as originally filed so that it is --

THE COURT: That is a problem that neither side addresses in its briefing.

The Ninth Circuit, my bosses, are reasonably liberal in stating that even though certain theories of action are not even hinted at in the Complaint, before you grant judgment,

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you have to give some opportunity for amendment.

Now, whether that would apply to a case like this, I don't know. We have here a mixup in one Cause of Action, Section 1 of Sherman and Section 2 of Sherman, and the only language about denying competing laboratories access to anything is in the paragraph that deals with Section 2 of the Sherman Act with the monopolization paragraphs.

Now, counsel has conceded -- first, the court has ruled there is no combination and what?

MR. McDONOUGH: Conspiracy, your Honor.

THE COURT: Conspiracy.

Counsel has conceded that there is no contract upon which he relies on between the defendant and plaintiffs.

MR. AGAY: There is no contract, but there is an agreement which I believe amounts to the same thing.

THE COURT: An "attempted contract" is a word -that is a group of words I never heard about.

MR. AGAY: It is something which the defendants . claim to be a contract; to wit, the, quote, Exhibit A; their exhibit in which they set forth the conditions under which they will accept film.

THE COURT: You have to be specific, and you just can't keep backing and filling in a situation like this.

Do you allege a contract between either/or both plaintiffs and Eastman, or not?

MR. AGAY: No. We believe that that contract was never entered into, but they have told us that they would not deal except under those terms.

I think that that amounts to the same thing for the purposes of Section 1.

THE COURT: Let me find out if there is any contract.

Have you got any case that says that a contract, which is a word of art -- you all know what it means.

You learned it in the first semester of law school, whether it be an offer and acceptance, or an unilateral contract; without a contract, what makes you think you have a Section 1 claim?

MR. AGAY: I don't have it at my fingertips, but I believe what the case says is that you don't need a plurality of actors. It involved cases where an attempt was made to impose certain conditions upon the plaintiff, who rejected those conditions; and the claim was that this was the contract.

THE COURT: Let's hear what those are. Cite them. Discuss them with me.

MR. AGAY: I believe Parke Davis was one of those which was cited in our brief, I believe. If you would give me a second to find the pages.

THE COURT: Is Parke Davis a Section 1 case?

MR. AGAY: I believe so, your Honor.

THE COURT: But does it go off on this question?

MR. McDONOUGH: In those cases, your Honor, there was an allegation that Parke Davis contracted with some of its customers to restrict competition in the business.

THE COURT: Those others could complain of that?

MR. McDONOUGH: Yes, that one was damaged by the contractual arrangements between Parke Davis.

Those, as I recall it, were re same-price-maintenance agreements or agreements to divide up territory, or whatever; but there were existing contracts between Parke Davis and the other principal plaintiffs in those cases -- or principal defendants -- and some people to make certain arrangements to restrict competition in a market; and the person or the plaintiff was complaining of the fact that those contracts had been made.

THE COURT: Let's assume -- and I want to tell
you both -- that hased on the allegations of the complaint,
I am prepared to grant the motion finding no dispute of
material fact -- that is, as to Section 1, Sherman -- no
dispute of material fact and entitled to judgment as a matter
of law.

Now, I know of no authority that says that a summary judgment motion cannot be addressed to the Complaint as pleaded; and when the other side does not seek a continuance for further discovery nor did it seek an opportunity to amend the Complaint until the hearing of the Motion for Summary

-377.

Judgment, that the court cannot go forward and grant summary judgment; and that is what I propose to do. I think we will go forward.

I want the record to be quite clear that there was no request for a continuance of this summary judgment motion herein for the purpose of discovery or any other purpose on the part of the plaintiffs.

Now, excuse me a second. Let me get my papers in order, and we will go forward.

MR. AGAY: Your Honor, may I --

THE COURT: Hold on, please. I have to get my papers in order.

I have a trial going, and I have a benchful of papers from that and another benchful of papers from other matters today; so you will have to stay with me.

Here are the papers in the 20th Century matter, Mr. Clerk. Let's get them cleared out of here.

The clerk is going to check in chambers. I think I left my notes there.

One drowns in a sea of papers.

Among the reasons that I would grant the summary judgment and find the defendant entitled thereto as a matter of law as to Sherman I is that as pleaded, the arrangement complained of in terms of the photofinishers market is not anticompetitive. It is, in fact, procompetitive because,

as pleaded, we find the defendant staying out of this part
of the business and thus benefiting every one of its potential
competitors who is willing to develop this type of picture.
It is procompetitive.

Moreover and as a separate reason, we have here in my view a proper application of rule of law enunciated some 60 years ago by the Supreme Court in U.S. v. Colgate. That rule of law, to be sure, has been limited in its factual application in the intervening 60 years, but the Supreme Court continues to cite it with approval where the facts are appropriate; and the rule of law is this: That a business person, a trader, or manufacturer in private business is free to exercise an independent discretion as to the parties with whom he will deal, announcing in advance the circumstances under which he will refuse to sell. That is a paraphrase of the language from U.S. v. Colgate and has been cited many times with approval since that case was decided.

It appears to me also that if by any chance under Sherman 1 there is any restraint of trade involved, it certainly looks to me like a reasonable one.

Now, I want to press on to Sherman, Section 2.

Sherman 2 outlaws monopolies in interstate commerce,
conspiracies to monopolize, and attempts to monopolize.

As plaintiff agrees, there can be no conspiracy in this case in view of the single defendant.

Plaintiff does allege an attempt to monopolize and an actual monopoly.

Plaintiff says that Kodak's photofinishing service in the development and printing of still photography on colored film is so much superior to all others that it should be deemed to constitute a market in and of itself. On that, I think there is probably a dispute of material fact in the evidence. Whether this is a market and a market in and of itself involves factual matters; and there is a dispute in the declarations that I have.

If there is a separate market on the part of Kodak, it is a monopoly thereof of Kodak. That monopoly may turn out to be either illegal or benign, and that gets us back to the question of the predatory aspects, if any, in the history of that monopoly by which it was created or is attempted to be created.

I have to tell you that although under the briefs both sides seem to assume that one developer out of hundreds or thousands of photo labs, one developer may constitute a market in and of itself if its product is greatly superior; so I have accepted that assumption, but I sure want you to try to marshal some further authority on it if the issue comes up again.

I know a little bit about photography as an amateur photographer and about developing, and I know and it would

not be difficult to take judicial notice of the fact that hundreds of custom finishing labs exist in the various cities of this country who are prepared to and do solicit the developing and printing of colored film; and those labs and many of them, (A), charge more money than Kodak, a lot more; and, (B), they sell their services as being vastly superior to Kodak's; and I am therefore a little bit skeptical about this legal claim that this is a separate market so superior that it must be regarded as a market in and of itself. Those are factual matters.

Our Circuit in the Industrial Building case notes

the claim made by one of the parties that one person's

product — in our case, it's one person's services — can be

so distinctively better as to constitute a market all by

itself; and that the Circuit, in noting that claim, expressed a

lot of doubt about it, but they did say that there should be an

opportunity to show it factually; and I think for that reason

that I would decline any summary judgment at this point on

Sherman 2.

The case I have in mind -- I don't know if you cited it -- is Industrial Building Materials v. Interchemical Corp., 437 F.2d 1336.

It's black-letter law, gentlemen, that even if there is a monopoly or an attempt to monopolize in a market, it is not redressable under Section 2 unless the monopoly

 was achieved by predatory methods or the attempt is being made by predatory methods and with a predatory intent.

MR. McDONOUGH: Your Honor, before you pass beyond Section 2, may I be heard briefly?

THE COURT: I haven't passed yet. I am still ruminating about Section 2. If you will be seated, I will finish ruminating, and then we will let you speak, and we will hear from you.

I will talk a little bit about this: Defendants make an argument that if they have a monopoly under Section 2, plaintiffs are not hurt by that monopoly; and, thus, the complaint on the Cause of Action for Section 2 ought to be dismissed.

Maybe, Mr. Agay, you will come to the podium and tell me what injuries you say that you have suffered from the alleged monopoly or attempt to monopolize, and where that injury is alleged in the Complaint.

MR. AGAY: May I have one moment, your Honor?
THE COURT: Sure.

MR. AGAY: The question, I believe, is whether or not we are within the target area of the acts that we complain of. We are the direct customer of -- the potential direct customer of Kodak. I don't know how much more direct we could be than that. We are the ones that are injured by the fact that they have the monopoly. We are the ones who

e unable --

THE COURT: Well, let me put this to you: What is e injury? Is it the fact that you can't get your pictures ite as nice as you think Kodak and Kodak alone can develop em?

MR. AGAY: Well, that is the primary injury. The cillary injury is that we are restricted in our ability to mpete with other magazines.

THE COURT: Well, first of all, Kodak's policy -d there is no conflict in the evidence on this -- is applied
ross the board to everybody who wants them to finish this

MR. AGAY: Well, there is that allegation, your nor. We have information that that isn't true, but we wen't had a chance at discovery to prove that.

THE COURT: Well, again, I have to take the evidence
I find it; and here it is: That this is Kodak's policy
ross the board fairly and evenly applied to everybody,
gazines or nonmagazines.

MR. McDONOUGH: Right.

nd of picture, isn't it?

THE COURT: They have announced publicly that they is not develop this kind of picture; so don't give them to rolls to develop. That is what they say.

Now, how can you be injured competitively if ery other magazine is in the same boat?

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MR. AGAY: Every other magazine doesn't use this subject matter.

THE COURT: Every other magazine built around the pictures of nude ladies. I think that should be stated as a basis in posing this whole case. Your two magazines are built around and centralized around pictures of nude ladies, isn't that true?

MR. AGAY: I don't know if it's centralized. It is certainly --

THE COURT: We have the two exemplars. They speak for themselves.

MR. AGAY: Yes.

THE COURT: Now, if you accept that every other magazine similarly stressing those pictures must meet the same policy problems that you do, thus you are not competitively disadvantaged; isn't that correct?

MR. AGAY: With all due deference, your Honor,

I don't say that we compete with Cosmopolitan and every other

magazine. Perhaps the magazines we would compete more with

are magazines with pictures that are slanted on this --

THE COURT: Is there any affidavit that you have furnished me that says that you compete with Cosmopolitan or anybody else?

MR. AGAY: We compete with all magazines. I am not certain -- there is no affidavit that says that we don't,

which is the problem here at hand.

THE COURT: Except I have the exemplars of the magazines, and it would appear to me strange -- if I can take judicial notice of Cosmopolitan, and I have seen it many times -- that to be told that you are competing with that magazine. You are saying that is factual now, and it is raised by the evidence; is that it?

MR. AGAY: I couldn't point to the evidence.

All I can say is that there is no request for judicial notice nor could there be judicial notice that the only magazines we do compete with are others equally affected by this formulation of policy.

THE COURT: Can you tell me anything else about the injury from this monopoly or attempted monopoly? What other injuries are there?

MR. AGAY: I would say that our competition, our ability to compete with other magazines, is the damage that we suffer in connection with the Section 2 claim.

May I point out one other thing? In answer to several comments the court has made and in particular this one, we do point out at the threshold of our brief that there has been no discovery; and many of these matters are peculiarly within the knowledge solely of Kodak.

THE COURT: What do you think the court is supposed to do?

Let's now discuss the summary judgment practice.

Are you saying that a court, met with a summary judgment motion and not confronted with any request to continue for the purposes of discovery or anything like that, can say, "Oh, sure. They are entitled to a summary judgment on the evidence I have, but maybe the plaintiff will get some other evidence somewhere, sometime; so I'd better not give the summary judgment."

Is that the way you see summary judgment practice in the federal court?

MR. AGAY: I believe that is what the authorities cite. A chance should be given for discovery, especially in antitrust cases.

THE COURT: Isn't there an obligation to seek a continuance for that purpose?

MR. AGAY: Not in the case that we have cited and reviewed, your Honor, starting at page 7 --

THE COURT: Hold on. Let's take a look at them.

Gentlemen, we are getting so late in the day that we will probably have to continue this to another day.

I want to look at your response and look at the cases you are talking about. Hold on.

I find your declarations, but I can't find your opposition memo. What page?

MR. AGAY: Starting at page 7, your Honor.

THE COURT: Let's hear one of those cases.

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What are the facts in that case? What was the motion? to dismiss? or for summary judgment?

MR. AGAY: I believe in each of these, it was for summary judgment.

THE COURT: Was it a Rule 12 or a different kind of rule?

MR. AGAY: I believe each of these was a Rule 56 or a motion for summary judgment. I confess not to have the facts in mind.

THE COURT: How about that, Mr. McDonough?

Let's discuss such summary judgment practice.

MR. McDONOUGH: Yes, your Honor.

It seems to me that the practice is very clearly set forth in Rule 56(f), which provides that in the event that someone confronted with a motion for summary judgment feels that he needs more time to be able to respond, he is supposed to file an affidavit with the court in which he sets out under oath what it is that he thinks he can get, and why he thinks that would be material or make a motion under Rule 56(f) which would justify the court in continuing the motion, which is precisely what the rule says; and that is what the practice is, as I understand it, and what the practice should have been if the plaintiff wasn't prepared to respond to the sotion and either fall or win on the basis of the record now before the court.

THE COURT: Well, Mr. Agay, that is what 56(f) says; and I do not find any affidavit from you that meets the requisites of Rule 56(f).

Did I miss it?

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MR. AGAY: No. The only discussion we have of that, your Honor, is on these pages on the Memorandums of Points and Authorities.

The only discussion that we have for the need of delay is on page 7.

THE COURT: There is no motion, and there is no affidavit.

Let's take another brief recess. I want to take a quick look at some of the learning under 56(f).

(Brief recess.)

THE COURT: Are you telling me, sir, that the cases cited at the top of page 8 in your memo are like this? You have no affidavit and no request for continuance but a statement by the Appellate Court that you can't take the record as you find it. Even though they haven't asked for any continuance, you have to give them time? Is that what the law is?

MR. AGAY: I don't want to make that representation without rereading the case, your Honor.

THE COURT: All right.

Gentlemen, I will tell you later what I am going

to do with respect to the First Cause of Action, which has a jumble of claims under Sherman 1 and Sherman 2.

I now am going to proceed to the Second Cause of Action and to the Third Cause of Action, which will be discussed together.

Counts Two and Three are Federal Civil Rights claims under Section 1983 of Title 42. That is Count Two, the 1983 claim; and Count Three is a Fifth Amendment claim. Both depend on state action or governmental action.

Defendants have before us evidence uncontradicted that indicates there is no state action. Their evidence is that they have had no threats of prosecution or contacts with the state of federal officials although they admit that the motivation for their policy for not developing this type of film rests in the state obscenity laws and their fear of prosecution thereunder.

Plaintiffs claim first that the requisite governmental action is furnished by state and federal trademark laws and federal patent laws. I do not find requisite government action from those laws.

I think plaintiffs are similarly wrong on the law, and they have cited no persuasive authority to support this claim.

It is my tentative view that a refusal to provide service and to deal based on fear of prosecution under state

law does not constitute state action sufficient to support the Second and Third Causes of Action, and I propose to grant the motion as to them.

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 There are several ways of rationalizing this result. In the first place, the case here is not a race discrimination case; and our own Circuit has recognized that state action requirements are different in race discrimination cases than they are in other cases. The decision I have in mind is Adams, decided in 1973, 492 F.2d 324.

The plaintiffs argue that it is improper to distinguish between race discrimination and First Amendment-type cases, which they say the instant case is.

There are cases, however, finding no state action even though the rights claimed are of the First Amendment type. One of those that was typical of that group is a case called Grafton v. Brooklyn Law School, 478 F.2d 1137 decided by the Second Circuit in 1973.

Additionally, I think the law is tending to a recognition that borderline obscenity material that might well fall within obscenity laws is not entitled to the same panoply of protection as are other First Amendment-type materials.

Four members of the Supreme Court have already articulated this concept in Young v. American Mini Theatres; and I believe the law is tending in that direction. That

is just really another reason for saying that our case is different from the cases where Southern restaurant owners did not serve blacks and/or their white supporters for fear of prosecution under Southern municipal ordinances segregating the races.

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Another factor should be mentioned. In all of those race cases, as the Supreme Court has said a couple of times, the statutes involved were clearly and beyond dispute invalid. Invalid, really, the Supreme Court said, on their face; and here the statute that is being discussed is quite different.

Kodak is concerned about state and federal statutes which carefully track the decisions of the Supreme Court, the recent decisions on obscenity. Those statutes are presumptively and probably valid. They have been adjudicated as being valid; so that is an additional reason for not applying the state action concept that has come down to us in those restaurant cases.

There is another factor that, at least, ought to
be hinted at or put on the table. There may well be a
privilege that constitutes a defense in both an antitrust
economic context and a Civil Rights context where the action
complained of is for the purpose of avoiding contravening,
presumptively valid statutes of this kind. I don't articulate
that as a privilege, but the law may also be developing in

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that direction.

Now, I want to move on to Count Four; and when I am through, I will let counsel discuss Counts Two, Three, and Four together.

Count Four seeks declaratory relief in the form of a declaration that both state and federal obscenity laws are unconstitutional. Count Four seeks to have both state and federal obscenity laws declared unconstitutional as applied to Kodak or someone else in Kodak's position who is marely a developer and photofinisher of photographs.

It is clear that these laws, both sets, have been adjudicated as valid in criminal cases and other contexts.

My tentative view is to dismiss Count Four. I say,

"dismiss." It could just as easily be a summary judgment, but I say "dismiss." It would be a holding, if I used summary judgment, that there is no bona fide dispute of material facts and that no entitlement has been shown as a matter of law.

The reason to grant the Motion to Dismiss is that there is no case or controversy; and there is no constitutional issue involving either federal or state obscenity laws -- particularly state -- when the case is pending in the federal court, nor should it be decided in a federal court without a case or controversy.

Rodak tells us it has no interest in upholding

either set of laws; and, as I have stated, neither set of laws has been asserted by the government involved against Kodak. There has been no threat of prosecution or other action yet posed. In essence, if the court went forward, we would have a collusive action or certainly one in which the interests of both the state and federal government are not represented in the sense of the laws challenged as unconstitutional.

Plaintiff says, however, that there is a way of having those governmental interests represented.

Plaintiff points to 28 U.S.C. Section 2403.

That section permits this court to notify state and federal officials of the pendency of this action and permits those government officials to intervene in this case, if they choose to do so.

There is, however, case law that the existence of 28 U.S.C Section 2403 does not make what is otherwise no case or controversy into an actual case or controversy.

The courts read Section 2403 as merely permitting intervention where the state government and federal government and their officials are not directly named as defendants. The courts have persisted in the holding that there is no case or controversy despite the existence of that statute.

The cases that so hold are U.S. v. Johnson,
319 U.S. 302, and Ruotolo v. Ruotolo, that's R-u-o-t-o-l-o,

proposed action is to grant the motion and dismiss without any leave to amend Counts Two, Three, and Four. My proposed action as to Count One with respect to both the Sherman 1 and Sherman 2 claims is to grant a Motion to Dismiss with a right to plead over, which pleading, if it is made, will separately state Sherman 1 and Sherman 2 claims with some specificity; then the plainties may do one of two things. They may move immediately to dismiss -- not for summary judgment, but to dismiss -- those claims, Section 1 and Section 2; or they may wait for discovery, a reasonable period being 60 days, to allow plaintief to discover and may thereafter move for summary judgment.

Now, I will hear from plaintiffs first, bearing in mind two things: The lateness of the hour and the fact that I have obviously given considerable thought to this matter.

MR. AGAY: If the court please, Kodak has come up with a policy which does not track with either law, doesn't use the words "patently offensive," is totally dissimilar to the policy in the federal act and state act, and now refuses to return the pictures under its censorship.

THE COURT: Now, so far as returning, that is a matter pending in the state court, which is a far better tribunal for the adjudication of that matter.

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A CONTRACTOR OF STANDARD STAND

MR. AGAY: As the affidavits point out, to get those pictures back two years later would be of little value, if any.

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What is needed is a determination as to whether or not in this intermediate step which -- I ran across a case which I didn't know before, which California has already held that you can't stop somebody in an intermediate stage. I can give the citation later, if need be -- to say that in this intermediate stage the law is going to permit or to allow a private party to act as to have a prior restraint and that there is no remedy either by challenging the application of the act under the Fourth Cause of Action; and assuming that it is proper, then Kodak's action is improper under the Second or Third Cause of Action grants to everyone the right to claim that this act permits them to do anything -- to withhold property or to do anything under the fear of prosecution; and if the government did that, there would be no doubt but that there were a prior restraint which would be struck down; and the cases we have cited show that if a private party does it, the same results obtain.

The court pointed out that there is maybe a distinction in the quantum of proof necessary to find state action in discrimination cases as opposed to First Amendment cases.

I have some difficulty with those decisions which state that there is a different standard. Either the state

is involved, or it is not involved. What the court does not mention is that we have also cited the abortion case; and there has been no statement that I have heard from the court or that I have read that says also in the abortion cases we'll have to come up with a different standard than we will in the instance of freedom of speech; so the statement dicta or otherwise say that we have got different ground rules when we are determining whether there is a state action in the discrimination cases would not apply to the doctor prohibited from performing the abortion in the case that we have cited.

There they found state action because of the -- I guess it was federal funds to construct the hospital in that particular instance so that if there can be state action there, why not here where the party admits, "The only reason we are not doing this is because of a federal law and a state law; and, therefore, we can interfere where the government could not in the return of the property."

We believe and the court has stated that there has never been a threat against Kodak of prosecution, although they have been doing this for years. There has never been a threat against Kodak for any prosecution.

Why is it now that they should be able to withhold it under the color of these laws which the government cannot do because it would constitute a prior restraint if the government did it, clearly.

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Why can they do indirectly, when the cases say they can't, why can they do indirectly -- the government -- what they cannot do directly.

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The brief points out, and it is clear that the effect of what is going on is Kodak is acting as a censor. It looks at every transparency and says, "This is good, this one's not. This one's good, this one's not," for a magazine publisher, not for the amateur user, who doesn't care whether he gets it back the next day or next week.

For the magazine publisher, this censorship totally or dramatically interferes with his ability to publish. In the noted cases, they tell us, "Don't interfere with the editorial rules."

THE COURT: Even though it is on notice and assumes the risks when it delivers that film for processing by Kodak?

MR. AGAY: Maybe if Kodak had said, "We make the determination ourselves that we don't want to be involved in this." Maybe it would be a different problem in that they are avoiding state action; but when Kodak says, "We do this under threat of law." And they claim that is the reason they are doing it because of this law, then so far as state action is concerned, there is state action.

Insofar as the other elements the court mentioned, if it is unconstitutional to do, then the contract of adhesion, if it is a contract, would not be valid anyway for the reasons

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we pointed out in our brief, that this simple notice cannot constitute a waiver in and of itself especially of a constitutional right.

Now, at the time those transparencies are returned, nobody knows what will be the ultimate content of the magazines; and to allow the proscription of the return — or to permit the proscription of the return of negatives and bar someone from getting those negatives or transparencies in a fashion that is usable, at least to the standards of this magazine and others, under the threat of federal law, so they claim, and under the threat of state law, so they claim — I don't know how there could be clearer state action unless the state said, "And we mean that Kodak or developers shall not even permit the transmission of those transparencies."

We don't believe the laws were intended to apply to Kodak. We believe that the court has stated that the proof lies in the pudding that nobody ever made any noises against Kodak; and yet we are standing here on the horns of a dilemma. We can't attack the law directly. The federal law we certainly can't attack in the state court very efficaciously; and we can't attack their failure to return the pictures because the mere --

THE COURT: How long are you going to need to argue this matter?

MR. AGAY: I think I'll be through very briefly.

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THE COURT: I don't mean to rush you. I just want to know because I have some engagement which I want to be sure I get to; and I want to give the other side a chance.

MR. AGAY: Rather than rushing, as the court indicated earlier, maybe we could continue it. I would prefer that because obviously the effect of the court's order would be —

THE COURT: How long will you need, Mr. McDonough?
You heard the court's indicated decision.

MR. McDONOUGH: Yes, your Honor. I am satisfied
with that indicated decision. I am not totally satisfied
with it, but it seems to me it disposes the matters that
were brought to the court today in our favor.

As I understand it, it gives him the opportunity to present --

THE COURT: I will give you five or six minutes more.

MR. AGAY: May I ask for a continuance? I think the court indicated earlier that --

THE COURT: That will be denied. I'd rather finish.

I have an important case in trial, and I just can't interrupt it; and I don't know when it would ever end so that I can get back to this one.

MR. AGAY: May I review my notes?

THE COURT: Of course. Take your time.

MR. AGAY: The court pointed to the fact that it believes that there is a broadening of the law that if there is something akin to obscenity, then it doesn't receive the same protection as other materials.

I respectfully disagree especially if that determination is made in advance of the publication without viewing the entire publication which, of course, would be impossible until the pictures are ultimately published.

THE COURT: The consequence of your argument is that even though there is criminal responsibility for aiding and abetting a criminal violator, that one must take the risk if he is asked to process part of a magazine or what may go into a magazine which may seem to that processor obscenity and put him in liability as an aider and abettor because he doesn't know what is going to be in the magazine as a whole? Is that your position? It is just too bad if the magazine as a whole turns out to be obscene? Then he can be held, but he can't do anything about it?

MR. AGAY: No, that is not my position. That is why I believe the Fourth Cause of Action is the appropriate cause of action and the appropriate way of dealing with this.

First of all, the answer to the court's question is that same question could have been posed with respect to the abortion matter. The hospital party was subject to criminal --

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THE COURT: That is the Fourth Circuit. That is not our Circuit, and it stands alone. Everybody else, including the Ninth Circuit, indicates that there is a difference between the rule of those restaurant cases as extended in via Fourth Circuit to the abortion cases and the rest.

MR. AGAY: Well, to the extent that there be a dilemma, if there really be a dilemma, and I question that for the same reasons as before that there never has been a prosecution, to the extent that there is a dilemma that the court foresees for these people and to the extent that there is a counterclaiming problem -- but here we have a private party setting itself up as the censor and the determiner of what it is that can be published and what it is that can't. If, as we have indicated, it is the only one who gives a good product, and if we pose a different example, what if it were a motion picture that we were involved in that they were developing, and what if they got the dailies and just saw some frames. They'd say, "Which pictures can be seen ultimately on the screen or which can't?"

What if they were getting excerpts from Ulysses in little bitty parts? Instead of photographing it, they were printing it, and they said, "This part is no good. You can't have it back. This part is good. You can have it back." We'd never have the opportunity of seeing the finished work if what the court is saying is correct, that we apply

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the statutes to the developer and we apply these statutes to the person that made the paper.

If these statutes were applied to the one that made the paper, they would say, "Well, if I sell them to Hustler, maybe they are going to be used in a magazine. Maybe I can be prosecuted."

The answer is that the statute is not intended to be so broadly construed, and there is no forum to get that construction especially when our dispute is with Kodak in the first place and there has been no threat of prosecution by the U.S. Attorney so that I believe that this is the appropriate place.

If Kodak doesn't have the concern although it fought pretty hard on the Fourth Cause of Action, if Kodak really doesn't have a concern, I believe that there is a dispute between us that should be declared that Kodak is not subject to these sanctions when it merely returns first edition film.

Maybe a different standard applies if we sent in pictures for redevelopment.

THE COURT: I'm sorry, sir, but your time has now expired.

The court's indicated decision will be the court's decision of findings and those that I have orally expressed.

I would like the defendants to order a transcript, please, of all proceedings this afternoon. That transcript,

as soon as it is prepared, will be filed and will constitute the court's findings and conclusions.

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Let it be clear that to the extent that I have granted any summary judgment, I have found that both parties dispute the material facts and that the moving party is entitled thereto as a matter of law.

Now, as to the First Cause of Action, the new complaint setting forth in separate counts and with some specificity the Sherman 1 and the Sherman 2 claims must be filed 10 days from today; and then, the plaintiff thereafter will have 60 days for discovery before the defendant can file any summary judgment motion, but defendant is not barred from filing a motion to dismiss earlier than that.

All right, gentlemen. Court is adjourned.

MR. McDONOUGH: Thank you, your Honor.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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27 28 HUSTLER MAGAZINE, INC., a corporation, et al,

Plaintiff,

EASTMAN KODAK COMPANY, a corporation,

Defendant.

NO. CV 80-561-IH

ORDER GRANTING MOTION TO DISMISS AS TO COUNT ONE AND GRANTING PARTIAL JUDGMENT, SUMMARY JUDGMENT, AS TO COUNTS TWO, THREE AND FOUR

There came before the Court for hearing on September 22, 1980, a motion by Defendant filed June 30, 1980, denominated as a motion for summary judgment. The Court announced that the motion would be considered in some respects as a motion to dismiss and in other respects as a summary judgment motion. Appearances were: for Defendant-moving party, Ball, Hunt, Hart, Brown and Baerwitz by John R.

McDonough, Esq. For Plaintiffs-respondents, Cooper, Epstein & Hurewitz by Alan Isaacman, Esq.

The Court having heard argument and having considered the evidence, Points and Authorities and other documents

- 1. As to Count 1, which incorporates causes of action under Sections 1 and 2 of the Sherman Act, the motion is granted as a motion to dismiss. Plaintiffs are given until October 2, 1980, to file an amended complaint stating in separate counts the causes of action under Section 1 and Section 2 of the Sherman Act with detailed allegations of harm.
- 2. As to the second and third causes of action,
 Defendant's motion is granted. The Court finds that there
 is no bona fide dispute of material fact and that Defendant
 is entitled to judgment as a matter of law. As to the
 second and third causes of action, Plaintiffs Hustler Magazine,
 Inc. and Chic Magazine, Inc. shall taking nothing by their
 action and Defendant Eastman Kodak Company shall have judgment
 against Plaintiffs.
- 3. As to Count four, Defendant's motion is granted. The Court find⁵ that there is no bona fide dispute of material fact and that Defendant is entitled to judgment as a matter of law. As to the fourth cause of action, Plaintiffs Hustler Magazine, Inc. and Chic Magazine, Inc. shall taking nothing by their action and Defendant Eastman Kodak Company shall have judgment against Plaintiffs.
- 4. The Court's further findings of fact and conclusions of law and a statement of its reasons are contained in a transcript of the proceedings in open court on September 22, 1980, which transcript is ORDERED filed upon its

preparation. In the event of any appeal as to any of the matters decided on September 22, 1980, the appellant shall furnish a copy of said transcript as a part of the record to the Court of Appeal.

- As to any summary judgment granted herein, each side shall bear its own costs.
- 6. The Clerk shall transmit a copy of this Order by United States mail to counsel for both sides.

DATED: September 29, 1980.

IRVING HILL, Judge United States District Court

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

1		CASE NUMBER	
Hustler Magazine	PLAINTIFF(S)	CV 80-5%1-IH	
Eastman Kodak Co.		NOTICE OF ENTRY	
	DEFENDANT(S)		

TO THE ABOVE NAMED PARTIES AND TO THEIR ATTORNEY(S) OF RECORD:

You are hereby notified that Order granting motion to dismiss as to count one and granting partial judgment ,summary judgment, as to counts two,three and four

in the above entitled case was entered in the docket on 9-30-80

You are also notified that if this case was tried and you introduced exhibits into evidence, they must be claimed at this office <u>after</u> the expiration of thirty days from the receipt of this notice. (After <u>sixty</u> days in cases in which the United States, its officers or agencies were parties) Unless they are claimed within thirty days after the expiration of the above period, they will be destroyed pursuant to Local Rule 20(a). If an appeal is taken they will, of course, be held until the Appellate Court finally determines the matter. Exhibits which are attached to a pleading will not be destroyed but will remain as a permanent record in the case file.

(over)

Civ 26 (10/78)

NOTICE OF ENTRY

CERTIFICATE OF MAILING

Ball, Hunt Hart & Brown 450 N.Roxbury Dr. Beverly Hills, Calif. 90210

Cooper, Epstein & Hurewitz 9465 Wilshire Blvd. Beverly Hills, Calif, 90212

MILE

IN ACTIONS ARISING UNDER THE ECONOMIC STABILIZATION ACT, THE EMERGENCY PETROLEUM ALLOCATION ACT, AND THE ENERGY POLICY AND CONSERVATION ACT, NOTICES OF APPEAL TAKEN FROM THIS JUDGMENT MIST BE FILED IN THE TEMPORARY EMERGENCY COURT OF APPEALS IN ACCORDANCE WITH THE RULES OF PROCEDURE OF THAT COURT.

EDWARD M. KRITZMAN, CLERK

Cornen M. Ceorge

Deputy Clerk

RELEIVED

JOHN R. McDONOUGH J. STEVEN GREENFELD

16 1980 FILED

BALL, HUNT, HART, BROWN AND BAERWITZ 450 North Roxbury Drive, Suite 500coopen applica MUNEWITZ Beverly Hills, California 90210

MOV 1 1980

LEPUTY

(213) 278-1960

LODGED

Attorneys for Defendant

HUSTLER MAGAZINE, INC., a

MAGAZINE, INC., a corporation,

corporation, and CHIC

EASTMAN KODAK COMPANY, a

vs.

corporation,

CENTRAL DISTRICT OF CALFORNIA

SEP 28 1980

CLERK, U.S. DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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) CIVIL ACTION NO. 80 00561 IH

JUDGMENT

Defendant.

Plaintiffs.

There came before the Court for hearing on September 22, 1980, a motion by Defendant filed June 30, 1980, denominated as a motion for summary judgment. The Court announced that the motion would be considered in some respects as a motion to dismiss and in other respects as a summary judgment motion. Appearances were: for Defendant-moving party, Ball, Hunt, Hart, Brown and Baerwitz by John R. McDonough, Esq. and J. Steven Greenfeld, Esq. For Plaintiffs-respondents, Cooper, Epstein & Hurewitz by Richard Agay, Esq.

The Court having heard argument and having considered the evidence, Points and Authorities and other documents filed in support of said motion and in opposition thereto, on September 29, 1980 made its "Order Granting Motion to Dismiss as to Count One and Granting Partial Judgment, Summary Judgment, as to Counts Two, Three and Four." In said Order, the Court (1) granted Defendant's motion, as a motion to dismiss, with respect to Count 1 of the complaint and gave Plaintiffs until October 2, 1980 to file an amended complaint stating in separate counts the causes of action under \$1 and \$2 of the Sherman Act, with detailed allegations of harm and (2) granted Defendant's motion for summary judgment as to Counts 2, 3 and 4 of the complaint. Plaintiffs did not file an amended complaint by October 2, 1980 nor have they filed such a complaint to the date of this judgment.

In light of the foregoing, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

 Count 1 of the complaint is hereby dismissed, with prejudice, and Plaintiffs Hustler Magazine, Inc. and Chic Magazine, Inc. shall take nothing thereby against Defendant Eastman Kodak Company.

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 2. Plaintiffs Hustler Magazine, Inc. and Chic Magazine, Inc. shall take nothing and Defendant Eastman Kodak Company is hereby granted judgment against Plaintiffs in respect of Counts 2, 3 and 4 of the complaint.

3. Each side shall bear its own costs.

DATED: October /4, 1980

TALE CY

IRVING HILL, Judge United States District Court ALAN L. ISAACMAN RICHARD D. AGAY potein & Murewitz ooper. ---Beverly Hills. California 90212 13131 CRESTVIEW 8-1111 Plaintiffs VS.

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CLERK, U. S. DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HUSTLER MAGAZINE, INC., a corporation, and CHIC MAGAZINE, INC., a corporation, CIVIL ACTION NO. 80 00561 IH NOTICE OF APPEAL

Plaintiffs,

EASTMAN KODAK COMPANY, a corporation,

Defendant.



Notice is hereby given that HUSTLER MAGAZINE, INC., and CHIC MAGAZINE, INC., Plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Order Granting Motion To Dismiss As To Count One And Granting Partial Summary Judgment, Summary Judgment As To Counts Two, Three And Four entered in this action on September 29, 1980.

DATED: October 21, 1980.

COOPER, EPSTEIN & HUREWITZ A Professional Corporation Attorneys for Plaintiffs

RICHARD D. AGAY

10/21/80

(VERIFICATION - 446 and 2015.5 C.C.P.)

County of	}•	I, the undersigned, say:	I EM INT
in the above entitled action	; I have read the foregoing		
		true of my own knowledge, exce o those matters that I believe it to	
**		foregoing is true and correct.	
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		(Signatur	*)
COUNTY OF LOS AN		m over the age of eighteen wears	and not a party to the
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ALAN L. ISAACMAN RICHARD D. AGAY potein & Murewitz ooper. SASS WILSHIRE SQULEVARD Beverly Hills. California 90212 (313) CRESTVIEW 8-1111 Attorneys for Plaintiffs corporation, and CHIC Plaintiffs, VS. EASTMAN KODAK COMPANY, a

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CLERK U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HUSTLER MAGAZINE, INC., a MAGAZINE, INC., a corporation,

CIVIL ACTION NO. 80 00561 IH

NOTICE OF APPEAL

corporation,

Defendant.

Notice is hereby given that HUSTLER MAGAZINE, INC., and CHIC MAGAZINE, INC., Plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Judgment entered in this action on November 17, 1980.

> December 15 DATED:

> > COOPER, EPSTEIN & HUREWITZ A Professional Corporation Attorneys for Plaintiffs

RICHARD D. AGAY

4100	ON . 446 2015 E C.C.B.
	10N - 446 and 2015.5 C.C.P.)
STATE OF CALIFORNIA, County of	I, the undersigned, say: I am the
in the above entitled action; I have read the foregon	
and know the contents thereof; and that the same therein stated upon my information or belief, and a	e is true of my own knowledge, except as to the matters as to those matters that I believe it to be true.
I certify (or declare) under penalty of perjury, that	the foregoing is true and correct.
Executed on(date)	af, Ca
	(Signature)
STATE OF CALIFORNIA	E BY MAIL - 1013a, 2015.5 C.C.P.)
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I certify (or declars), under penalty of perjury. that the foregoing is true and correct and that I am employ in the office of a member of the bar of this Court at whose direction service in the court at the court at whose direction service in the court at t

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"Both the verification and proof of service by mad forms, being signed under penalty of perjury, do not require noturisation.

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CIVIL DOCKET CONTINUATION SHEET FPI-848 DEFENDANT PLAINTIFF DOCKET NO CV80-56 HUSTLER MAGAZINE, INC. EASTMAN KODAK CO. PAGE __OF___PAGES DATE NR. PROCEEDINGS 12/3/8d fb ----Fld orig of Reptr's transc of prodgs had on 9/22/80 2-15-80 lw 23. Fld pltf's NOTC OF APPEAL to 9th Cir C/A frm Jdgmt ent 11-17-80 \$70.00 fldng & docket fees pd. 24.Fld pltfs designation of rpts transpt on appeal note of which was fld on 12-15- $\mathfrak O$ 12-24-80cg -6-81 cg 25. Fld defts & appellee note re designation of rpts transpt - 420-

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DATE	NR.	PROCEEDINGS Page 1.
2/13/80	jcd	1.Fld Complt. Issd Summs. 2.Fld Reqst & Ord for serve of Process by Other than the USM,naming Steve Jammey.
3-13-80	yd	3. Fld retn of sms, srvd Eastman Kodak on 2-26-80
3-17-80	yd	4. Fld Stip & ORD ext ti to 4-21-80 for deft to resp to cmplnt
3-17-80	yd	5. Fld deft's note of appearance by Eastman Kodak Co.
	lp e	6.Fld deft Eastman Kodak Company, ANSWER to COMPLNT.
-12-80		7 Fld ORD re early meeting & stat conf rtmb1 7-21-80, 2PM
6-9-80		LODGED-defts prop S/J (PLACED IN FILE NOT USED) LODGED-defts prop findings of fact & conclu of law (PLACED IN FILE NOT USED) 8.Fld defts note of moth & moth for S/J; affid declar & memo of P/A
5-9-80		9.Fld defts first status rept
(cg	10 MIN ORD: crt declines to sign stip cont hrg on moth for S/J.stip ordered lodged only, notused, crt ords hrg on moth for S/J cont fr 6=30-80 to 10am 8-19-80 pltfs response to the moth is to be fld NLT 8-4-80 & defts reply to fld NLT 8-11-80 crt furt ords that the mandatory status conf, currently set for 7-21-80 off cal to be reset if necces at the concl of the hrg on S/J LODGED ONLY NOT USED pltfs stip cont hrg date & ext ti for filing pape in oppos & ord
	cg	LODGED ONLY NOT USED-pltfs applic for ex parte ord ext ti for fl & svc of pltfs resp to defts mot for S/J 11.MIN ORD: crt hears cnsl & grnts pltfs ex parte applic.hrg on S/J cont to 9-15-80 at 10am,pltfs breif to be fld NLT 8-26-80 defts reply brief NLT 9-2-80 No Fur Exts will be grntd
6-26-8U		12.Fld pltrs proof of svc of sveral docs on 8-26-80 13.Fld pltrs declars & afr in opp to deft's mot for S/J 14.Fld pltrs stmt or genuine issues 15.Fld pltrs memo or P/A in opp to defts for S/J 16.Fld pltrs joinder in prop findings of fact
9-2-80	cg	17.Fld deft Kodak reply memo on mot for S/J
-29-80	cg	18.Fld ORDER grntng mot to dism as to ct 1 & grntng partial jugmt S/J, as to cts 2,3 & 4 (Ent 9-30-80) mid cpys & notes
19-2-80 19-22-80		Fld rpt's transpt of procs tkn on 9-22-80 19.MIN ORD:crt hears oral arg & rules as follows, as to ct 1 defts mot for S/J is grntd as a mot to dism, pltf to file A/C NLT 10-2-80.as to 2ns & 3rd causes of actn ,crt grnts S/J to deft, as to ct 4,crt grnts S/J to deft, deft to prep ord & file it
0-28-80	cg	10DGED-defts judgmt
8/80	up	20. Fld plfts NOTC OF APPEAL to the 9th Cir C/A from ord ent on 9/30/80; \$70.00 flg fee and docket fee pd.
10-27-20	lcg	PLACE IN FILE NOT USEDpltfs stip re-final judgmt & ord
1-6-80	cg	21.Fld pltfs design of rpts tranpt 22.Fld Judgmt & ORD thet 1 of complet is dism w/prej & pltfs shl tk nothing against deft.pltfs shl tk nothing & deft Eastman Kodak is grat jdugmt against pltfs in resp of cts.2.15.4 of the complet.each side to bear its own costs (Ent 11-17-20) (MD JS-6 mld cpys & notes
		- 421-

Office Supreme Court, U.S. F I L E D

MAY 16 1983

ALEXANDER L. STEVAS, CLERK

No. 82-1753 IN THE

Supreme Court of the United States

October Term, 1982

HUSTLER MAGAZINE, INC., a corporation and CHIC MAGAZINE, INC., a corporation,

Petitioners.

VS.

EASTMAN KODAK COMPANY, a corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN R. McDonough,
Counsel of Record,
J. Steven Greenfeld,
Ball, Hunt, Hart, Brown
AND BAERWITZ,
450 North Roxbury Drive,
Fifth Floor,
Beverly Hills, Calif. 90210,
(213) 278-1960,

Attorneys for Respondent.

Statement in Compliance With Rule 28.1.

The following is a list of subsidiaries and affiliates of Respondent Eastman Kodak Company other than companies whose stock is wholly owned by Eastman Kodak Company and/or its officers, or wholly owned subsidiaries and affiliates:

United Photofinishers Limited
E.F. Dowty Limited
The London Pharmacists' D. & P. Service Limited
McInnes & Walton Limited
Miller Bros. Hall & Company Limited
Photo Finishers (Glasgow) Limited
Reflex Photo Works Limited
The Roll Film Company Limited
Stuart Photo Services Limited
Taylors Developing & Printing Works Limited
G. & E. Thompson Limited
United Photographers Limited
University Photo Works Limited

Questions Presented for Review.

- 1. Whether the courts below correctly concluded that the district court lacked jurisdiction to adjudicate petitioners' second and third claims for relief because the policies and practices of respondent of which petitioners complain constitute private corporate action rather than "governmental action" within the meaning of the First Amendment to the United States Constitution, or "state action" within the meaning of the Fourteenth Amendment to the United States Constitution, or action "under color of state law" within the meaning of 42 U.S.C. §1983.
- 2. Whether the courts below correctly concluded that the district court lacked jurisdiction to adjudicate petitioners' fourth claim for declaratory relief as to the constitutionality of certain federal and state obscenity statutes because that claim lacks the concrete adverseness necessary to constitute a justiciable controversy within the meaning of Article III of the United States Constitution and the Federal Declaratory Judgment Act, Title 28 U.S.C. §2201.
- Whether, if the district court had jurisdiction of petitioners' second, third and fourth claims for relief, the petition for certiorari should be denied because petitioners' claims are manifestly without substantive merit.

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IN THE

Supreme Court of the United States

October Term, 1982

HUSTLER MAGAZINE, INC., a corporation and CHIC MAGAZINE, INC., a corporation,

Petitioners.

VS.

EASTMAN KODAK COMPANY, a corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE.

A. Proceedings Below.

Petitioners, publishers of Hustler and Chic Magazines, commenced this action against respondent Eastman Kodak Company ("Kodak") on February 13, 1980, by filing a complaint in the district court below seeking injunctive relief, damages and a declaratory judgment. (EX 1-11.)² Petitioners alleged that, as ap-

^{&#}x27;On February 13, 1980 petitioners also filed action No. C313377 in the Superior Court of the State of California for the County of Los Angeles against Kodak and "Doe" defendants, seeking injunctive and declaratory relief under California law similar to the relief sought in the instant action. Kodak answered the complaint in the state court action. That case is presently at issue but has not been prosecuted by petitioners.

Items of the clerk's record will be cited to herein by parenthetical reference to page numbers of the excerpts contained in Appendix B prepared and filed by the petitioners, followed where appropriate by internal line numbers (e.g., "(EX 19: 25-28)"). References to the Petition for Writ of Certiorari will be made herein by parenthetical reference to its page numbers (e.g., "(Pet. 15)").

plied to petitioners, respondent Kodak's policy and practice of refusing to return to its customers certain film depicting genitals or sexual conduct and pictures developed therefrom (hereinafter referred to, collectively, as "sexually explicit pictures") violates the federal antitrust laws (first claim for relief), deprives petitioners of their right to freedom of speech in violation of 42 U.S.C. §1983 (second claim for relief), and deprives petitioners of rights protected by the First and Fourteenth Amendments (third claim for relief). Petitioners also alleged that they are entitled to a declaratory judgment against respondent Kodak that certain state and federal obscenity statutes are unconstitutional as applied to transactions between petitioners and Kodak (fourth claim for relief). On June 9, 1980, Kodak moved for summary judgment on the grounds that the case presents no genuine issue of material fact and that Kodak was entitled to judgment as a matter of law, supporting its motion by affidavits. Petitioners opposed the motion, filing affidavits in support of their opposition.

On September 22, 1980, the district court, after hearing, granted Kodak's motion for summary judgment as to petitioners' second, third and fourth claims for relief on the ground that none of them presented a claim within its subject matter jurisdiction. The Court dismissed petitioners' first claim for failure to state a claim upon which relief can be granted, with leave to amend within ten days. (EX 360-403.) Petitioners failed to file an amended complaint as to the first claim for relief and on November 14, 1980, final judgment was entered in favor of Kodak. (EX 412-14.)³

Petitioners appealed the district court's judgment to the Court of Appeals for the Ninth Judicial Circuit. After the case was briefed and argued, the Court of Appeals affirmed the judgment of the district court by issuance of the following Order, filed on September 16, 1982:

We affirm the grant of summary judgment for the reasons announced by the district court.

Petitioners filed a petition for rehearing and suggestion for rehearing en banc in the Court of Appeals. The petition for rehearing

The petition for writ of certiorari does not challenge the disposition by the courts below of petitioners' first claim for relief.

was denied and the suggestion for rehearing en banc rejected by an order of a majority of the panel, filed on November 15, 1982, wherein it is stated that no judge of the court had requested a vote of the court on the suggestion for rehearing en banc.

B. Statement of Relevant Facts.

The facts relevant to this petition for certiorari, as shown by the parties' pleadings and the affidavits they have filed, are undisputed. Petitioners, publishers of magazines which include sexually explicit material, are subsidiaries of Larry Flynt Publications, Inc. (EX 384: 3-12; 272: 10-12.) Respondent Kodak is a private corporation which markets various kinds of photographic film, operates ten film processing laboratories nationwide dealing with the general public, and provides processing chemicals and technical assistance to non-Kodak film processing laboratories. (EX 112-25.)

In mid-1978, Kodak concluded that Kodak and/or its employees risk criminal prosecution if they knowingly deliver or mail to customers sexually explicit pictures the mailing or delivery of which by any person is prohibited by constitutionally valid federal and state obscenity statutes. Kodak determined that the controlling decision respecting the constitutionality of obscenity statutes is *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), wherein this Court stated that distribution of patently offensive representations or descriptions of the following subject matter may be prohibited by state and federal obscenity laws without violating the free speech guarantees of the United States Constitution: (a) ultimate sexual acts, normal or perverted, actual or simulated and (b) masturbation, excretory functions, and lewd exhibition of genitals. 413 U.S. at 25.4

Kodak further determined that federal obscenity laws and state obscenity statutes in those states in which Kodak operates film processing laboratories prohibit the mailing and distribution of the types of pictures that fall within the *Miller* guidelines and had been held constitutionally valid as so applied. (EX 101-02.)

^{&#}x27;These criteria stated in Miller are referred to herein as "the Miller guidelines".

Based on these determinations, Kodak adopted the business policy of not returning to customers sexually explicit pictures discovered during the routine processing of customer orders which depict subject matter that falls within the *Miller* guidelines. Kodak's policy was formulated unilaterally and was adopted solely to avoid the risk of injury and expense that would result if Kodak or its employees or both were accused or convicted of violating constitutionally valid state and federal obscenity laws. Kodak's policy was *not* formulated (a) at the request of, in cooperation with or with the knowledge of law enforcement authorities or (b) with any intent or purpose on the part of Kodak of participating in the enforcement of obscenity laws, of engaging in censorship, or of suppressing the publication or distribution by other persons, including petitioners, of sexually explicit film, pictures or magazines. (EX 103-05.)

Kodak's formulated policy was reduced to a written notice to customers reading as follows:

NOTICE

Because of Federal and State laws relating to pornography, Eastman Kodak does not wish to handle pictures that show sexually explicit conduct. Our Legal Department has informed us that processing pictures for customers depicting the following subject matter may subject Kodak to potential criminal prosecution:

- (a) Ultimate sexual acts, normal or perverted, actual or simulated.
- (b) Masturbation, excretory functions or lewd exhibitions of genitals.

Film sent to Kodak for processing which depicts such subject matter will not be returned because of the potential legal problems mentioned above.

(EX 106; emphasis added.)⁵

Kodak's film processing laboratories gave copies of this notice to customers in the latter part of 1978 and the first part of 1979.

⁵The subject matter depicted on film submitted to Kodak for processing can be ascertained only after that film has been developed. Accordingly, to implement its policy Kodak must rely on such advance notice and, in the event the notice goes unheeded, on its refusal to return to customers sexually explicit pictures to which the notice applies.

(EX 104: 1-5.) On December 8, 1978, a copy of the notice was given by Kodak's Hollywood, California film processing laboratory to Robert DeMarco, who represented himself as the Photo Director of Hustler Magazine. Mr. DeMarco read the notice at that time and told Kodak's representative that he would inform Larry Flynt as to Kodak's policy. (EX 109: 13-25.) Mr. DeMarco does not deny receiving such notice.

Petitioners alleged in their complaint that from February 13, 1979 through February 13, 1980, Kodak refused to return a number of pictures developed from film which petitioners transmitted to Kodak's processing laboratories for development. (EX 3: 19-22.) In this Court, as in the courts below, Kodak accepts petitioners' assertion that sexually explicit pictures withheld by Kodak's film processing laboratories during the relevant time period, although submitted under the names of individual photographers, are owned by petitioners. (EX 366: 9-10.)

Two factual matters deserve special emphasis. First, petitioners seek to make it appear that Kodak withholds sexually explicit pictures from petitioners for the purpose of preventing petitioners from publishing them in their magazines; petitioners characterize such alleged withholding as a "prior restraint" on their publishing activity forbidden by the First Amendment. The record not only does not support these assertions — it belies them. Kodak withholds sexually explicit films and pictures from all customers, not just publishers. Kodak does not do so to prevent the customers from using the pictures either to gratify themselves or to display to others, but only to protect Kodak and its employees from criminal charges and prosecution based on the very act of mailing or otherwise delivering the film and pictures to Kodak's customers. Kodak does not seek to play the censor but only to avoid violation of the law.

⁶18 U.S.C. §§1461, 1462 and 1465 prohibit any person from knowingly mailing or transporting in interstate commerce any "obscene, lewd, lascivious, or filthy" material and impose criminal sanctions upon violators.

California Penal Code §311.2(a) provides, in relevant part:

Every person who knowingly sends or causes to be sent, . . . , or in this state possesses, prepares, publishes or prints, with intent

Second, if Kodak and/or its employees were prosecuted for returning sexually explicit pictures to petitioners in violation of an obscenity law, all that would be before the trier of fact would be the pictures themselves, unedited and without ameliorating context. It would be no defense in such a criminal prosecution to show that if the pictures had been returned by Kodak to these petitioners, they might not have used the pictures in their magazines, or that before publication petitioners might have modified those parts of the pictures that violate the Miller guidelines, or that the issues of Hustler and Chic Magazines in which the pictures appeared might have contained sufficient material of redeeming social value to cause the magazines, taken as a whole, to be protected by the First Amendment. In short, insofar as petitioners' publications are concerned, Kodak deals only with raw material, not the finished product.

SUMMARY OF ARGUMENT.

Petitioners' unconditional submission of film to Kodak for processing, with advance notice of Kodak's policy of refusing to return to customers certain sexually explicit pictures, bars all of petitioners' claims for relief.

None of the petitioners' alleged claims for relief falls within the subject matter jurisdiction of the federal courts. Kodak's policy and practice of refusing to return sexually explicit pictures to petitioners, unilaterally formulated in order to avoid violating constitutionally valid federal and state obscenity statutes, constitutes private action, not "governmental action" within the meaning of the First Amendment, or "state action" within the meaning of the Fourteenth Amendment, or action "under color of state law" within the meaning of 42 U.S.C. §1983.

The district court did not have subject matter jurisdiction with respect to petitioners' fourth claim for relief, which seeks a declaration that certain federal and state obscenity statutes may not

to distribute or to exhibit to others, or who offers to distribute, distributes or exhibits to others, any obscene matter is guilty of a misdemeanor.

These statutes which Kodak seeks to avoid violating have been held to pass constitutional muster under the *Miller* guidelines. *Hamling v. United States*, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974) (re 18 U.S.C. §1461); *Bloom v. Municipal Court*, 16 Cal.3d 71, 127 Cal.Rptr. 317, 545 P.2d 229 (1976) (re California Penal Code, §§311 and 311.2).

constitutionally be applied to allegedly inhibit the petitioners' publishing activities. Kodak has no interest in defending against that claim or upholding the challenged statutes. Petitioners' claim therefore lacked the concrete adverseness necessary to create a justiciable case or controversy within the meaning of Article III of the United States Constitution and 28 U.S.C. §2201.

Assuming, arguendo, that any of petitioners' claims falls within the subject matter jurisdiction of the federal courts, the petition for writ of certiorari should be denied because none of petitioners' claims has substantive merit. Magazine publishers do not have greater rights than other citizens to use the facilities of private film developers to have sexually explicit pictures processed and returned because the pictures are to be used or considered for use in their publications.

ARGUMENT.

I.

PETITIONERS ARE BOUND BY THE LIMITATIONS STATED IN KODAK'S NOTICE TO CUSTOMERS.

Kodak's notice to customers, which was given to petitioners' representative DeMarco, states in relevant part the terms upon which Kodak is willing to accept film for processing and return to customers. Such terms constitute a part of the contract which defines the legal relationship between Kodak and its customers and the rights and obligations of Kodak thereunder. Pursuant to such contract, Kodak has reserved the right not to return to customers, including petitioners, pictures which depict the kind of sexually explicit conduct described in Kodak's customer notice. By submitting film to Kodak with knowledge of the terms and limitations of Kodak's offer to process and return pictures to customers, petitioners accepted and became bound by those terms and limitations.

When an offer to render a service on conditions is made, an acceptance of the service constitutes an acceptance of the conditions as well. *Massachusetts Mutual Life Insurance Co. v. George & Co.*, 148 F.2d 42, 46 (8th Cir. 1945). Similarly, the receipt and acceptance by one party to a contract of a writing from the other party purporting to state the terms and conditions of the contract binds both parties. *Bernard v. Walkup*, 272 Cal.App.2d 595, 602, 77 Cal.Rptr. 544 (1969).

Petitioners contend that they did not subjectively agree to the terms of Kodak's notice or intend to waive any right or claim against Kodak for the return of their pictures. (EX 299: 6-10.) However, there is no evidence that petitioners expressed any reservation or objection to Kodak's policy when their pictures were submitted to Kodak for processing. Accordingly, they are bound by the terms of Kodak's notice. It is axiomatic that the existence of mutual assent to a contract is determined by objective rather than subjective criteria, relying upon the words and conduct of the parties to determine the existence and terms of their contract. Meyer v. Benko, 55 Cal. App. 3d 937, 942-43, 127 Cal. Rptr. 846 (1976). Petitioners' unconditional submission of film to Kodak for processing, with advance notice of Kodak's policy, con-

stituted petitioners' acceptance of the conditions and limitations of Kodak's offer and the formation of a contract on those terms. That contract bars all of petitioners' claims for relief in this action.⁷

II.

THE DISTRICT COURT LACKED JURISDICTION TO ADJUDICATE PETITIONERS' THIRD CLAIM FOR RELIEF BECAUSE PETITIONERS HAVE NO RIGHT OF ACTION AGAINST KODAK BASED ON EITHER THE FIRST AMENDMENT OR THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. Petitioners Have No Right of Action Against Kodak Based on the First Amendment to the United States Constitution.

Drawing a parallel to the "state action" decisions of this Court which are discussed below, petitioners argue, in effect, that where a citizen's rights protected by the First Amendment are violated by the conduct of a private corporation which is compelled by or otherwise attributable to the laws or policies of the Federal Government, the citizen has a right of action in federal court against the corporation to restrain such conduct and recover damages for injuries which the conduct has allegedly inflicted. For purposes of discussion herein, we refer to such conduct as "governmental action".

Assuming the validity of their contention that such a federal right of action exists, petitioners argue that the interrelationship between the Federal Government and Kodak's alleged deprivation

⁷The courts below did not rely upon this contractual defense. However, in an almost identical lawsuit brought by another magazine publisher, the New Jersey state courts granted judgment in favor of Kodak on this basis. *Penthouse International, Ltd. v. Eastman Kodak Co.*, 79 N.J.Super. 155 (Ch.Div. 1980), *affd. per curiam*, No. A-3110-80-T2 (App.Div. April 2, 1982). If this Court should find unpersuasive the reasons given by the district court for granting summary judgment against petitioners, the judgment is nevertheless correct on the basis of Kodak's contractual defense and was entitled to affirmance by the Court of Appeals on that ground. *Helvering v. Gowran*, 302 U.S. 238, 245, 58 S.Ct. 154, 82 L.Ed. 224 (1937); *Hummell v. S.E. Rykoff & Co.*, 634 F.2d 446, 452 (9th Cir. 1980). Accordingly, there is no reason to grant the petition for writ of certiorari.

of petitioners' First Amendment rights necessary to give petitioners such a right of action is established in this case in two ways: (1) Kodak allegedly holds patents and trademarks issued by the Federal Government and (2) Kodak's policy and practice of refusing to return sexually explicit pictures to petitioners is based in part on Kodak's desire to comply with federal obscenity statutes. Neither contention is valid.

The Courts Below Correctly Held That the Grant of Federal Patent and Trademark Rights Does Not Make the Conduct of the Grantee "Governmental Action".

Petitioners appear to contend that because Kodak allegedly holds federal patents and trademarks, Kodak's day-to-day business activities constitute "governmental action". If petitioners were correct, every act of any holder of a patent or trademark would constitute "governmental action". While there are no cases squarely on point, the courts below correctly rejected this bizzare contention in the light of decisions of this Court and other courts in analogous cases which rejected claims that "state action" existed because a state had in some fashion authorized a corporation to exist or to engage in particular activity. (EX 389: 17-20.)

The grant of a corporate charter does not make the corporation's business policies and practices "state action". Greenva v. George Washington University, 512 F.2d 556, 560 (D.C. Cir.), cert. denied, 423 U.S. 995, 96 S.Ct. 422, 46 L.Ed.2d 369 (1975). Similarly, the grant of a liquor license to a private club does not make the racially discriminatory policies of that club "state action" under the Fourteenth Amendment. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 177, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972). Nor does the fact that private entities conduct business pursuant to state licenses or permits make their activities "state action". Fulton v. Hecht, 545 F.2d 540 (5th Cir.), cert. denied, 430 U.S. 984, 97 S.Ct. 1682, 52 L.Ed.2d 379 (1977) (state licensing and regulation of greyhound race track did not make licensee's acts state action within 42 U.S.C. §1983); Gemini Enterprises, Inc. v. WFMY Television Corp., 470 F.Supp. 559 (N.D.N.C. 1979) (action by state-licensed broadcaster denying media access to an astrological forecasting service did not constitute state action within 42 U.S.C. §1983); Guthrie v. Alabama By-Products Co., 328 F.Supp. 1140 (N.D.Ala. 1971), affd., 456 F.2d 1294 (5th Cir. 1972), cert. denied, 410 U.S. 946, 93 S.Ct. 1352, 35 L.Ed.2d 613 (1973) (discharge of industrial waste pursuant to state-issued permit did not constitute state action within 42 U.S.C. §1983); cf. Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 93 S.Ct. 2080, 36 L.Ed.2d 772 (1973) (plurality opinion: action of broadcast licensee in not accepting editorial advertisements did not constitute sufficient "governmental action" to give rise to a private right of action under the First Amendment).

Petitioners allege that Kodak's product has a "unique superiority" which is the result of its ownership of numerous patents and trademarks. (Pet. 45.) This conclusory allegation, if true, would not satisfy the "governmental action" requirement. This Court has held that the claim that a state allegedly conferred monopoly status upon a defendant is not determinative in considering whether or not that defendant's termination of electrical service was "state action" within the Fourteenth Amendment. Jackson v. Metropolitan Edison Company, 419 U.S. 345, 351-52, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974); accord, Taylor v. St. Vincent's Hospital, 523 F.2d 75, 77-78 (9th Cir. 1975), cert. denied, 424 U.S. 948, 96 S.Ct. 1420, 47 L.Ed.2d 355 (1976).

Petitioners have cited no case and Kodak has found none deciding the precise question whether a grant of federal patent or trademark rights is sufficient to make all of the activities of the grantee "governmental action". The analogous cases cited above require a negative conclusion. Moreover, many of those cases dealt with a state's specific and necessary authorization of a private entity to engage in the particular activities of which the plaintiffs complained. That is not true with respect to the alleged grant of federal patent and trademark rights to Kodak. Federal patents and trademarks are not necessary to authorize and do not authorize the transaction of business or development of film by Kodak. Instead, the rights granted merely prevent third parties

from interfering with protected property interests of Kodak.⁸ Accordingly, there is *less* official federal governmental involvement in the conduct of Kodak of which petitioners complain than there was in the case cited above in which no "state action" was found within the meaning of the Fourteenth Amendment or 42 U.S.C §1983.

 The Courts Below Correctly Held That Kodak's Policy and Practice of Complying With Federal Obscenity Statutes Does Not Make Its Refusal to Return Sexually Explicit Pictures to Petitioners "Governmental Action".

We discuss and refute below (in Section II B2 of this Brief) petitioners' contention that Kodak's policy and practice of refusing to return sexually explicit pictures to petitioners constitutes "state action" because they are based in part on Kodak's desire to avoid violation of California's obscenity statute, California Penal Code, §311. The same arguments apply to petitioners' contention that Kodak's policy and practice constitute "governmental action" because they are based in part on Kodak's desire to avoid violation of Federal obscenity statutes. Accordingly, we incorporate by reference here our refutation below of the contention that Kodak's compliance with California's obscenity statute makes its challenged policy and practice "state action".

B. Petitioners Have No Right of Action Against Kodak Based on the Fourteenth Amendment to the United States Constitution.

The Fourteenth Amendment does not apply to conduct which falls wholly within the private sector. Burton v. Wilmington Parking Authority, 365 U.S. 715, 721-22, 81 S.Ct. 856, 6 L.Ed.2d

[&]quot;Petitioners cite Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 84 S.Ct. 784, 11 L.Ed.2d 661 (1964) and Griffith Rubber Mills v. Hoffer, 313 F.2d 1 (9th Cir. 1963), for the proposition that patent and trademark rights are issued not for private benefit but for the public good. (Pet. 48.) However, neither of these cases advance petitioners' argument. Both note that the issuance of a patent is the grant of a statutory monopoly which gives the patent holder the right to exclude others from the unauthorized use of his invention for a limited period of years. Patent grants benefit the general public only in the sense that the patent holder must publicly disclose his invention to get his patent and that, upon expiration of the patent, the invention enters the public domain and may be used freely by anyone.

45 (1961). Consequently, where action taken is by a private individual or corporation without significant official state involvement the Fourteenth Amendment imposes no limitation upon such conduct, and persons allegedly injured by such conduct have no right of action under the Fourteenth Amendment. *Jackson v. Metropolitan Edison Company*, 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972).

It is true, of course, that situations have arisen where state law or policy and the conduct of private corporations or individuals were so intertwined that the activities of the latter were held by this Court to constitute "state action" which brought their conduct within the reach of the Fourteenth Amendment. As this Court has said, in determining whether there has been sufficient state governmental involvement with the conduct of a private person or corporation to make the latter's policies and practice "state action", a court's "inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." Jackson v. Metropolitan Edison Company, supra, 419 U.S. at 351 (citations omitted).

In an attempt to establish a right of action against respondent under the Fourteenth Amendment, petitioners contend that the requisite element of "state action" is established in that (1) Kodak allegedly holds trademarks issued by California, (2) Kodak's policy and practice were adopted, in part, to avoid violation of California's obscenity statute and (3) Kodak is allegedly performing the "public function" of censorship. All of these contentions are wrong.

 The Courts Below Correctly Held That the Grant of State Trademark Rights Does Not Make the Conduct of the Grantee "State Action".

Petitioners' contention that Kodak's day-to-day business activities constitute "state action" because Kodak allegedly holds trademarks issued by California is parallel in substance to their argument (discussion above in Section II A1 of this Brief) that Kodak's activities constitute "governmental action" because

Kodak allegedly holds federal patents and trademarks. Accordingly, we incorporate by reference here our discussion and refutation above of this contention.

The Courts Below Correctly Concluded That Kodak Does Not Act "Under Compulsion of Law" Within the Meaning of the Fourteenth Amendment.

Petitioners argue that Kodak's taking of steps designed to avoid prosecution under California's constitutionally valid obscenity statute makes Kodak's policy and practice "state action". This contention should be rejected.

The evidence is uncontroverted that Kodak acted *unilaterally* in adopting its challenged policy and *not* in concert or collaboration with, or at the request or instigation of, any state (or federal) law enforcement official. Nor did Kodak act to further the social policies reflected in the obscenity laws, or as a "volunteer policeman" to see that those laws are enforced against petitioners or anyone else. Kodak adopted its policy only to protect its own interest — solely because Kodak fears that returning the sexually explicit pictures it withholds would subject Kodak and/or its employees to the risk of being criminally prosecuted for violating constitutionally valid state (and federal) obscenity laws. In adopting the challenged policy Kodak's officers acted solely as business executives, *not* as either adjunct government officials or censors. (EX 100-05.)

Nevertheless, petitioners contend that the requirement of governmental involvement sufficient to constitute "state action" is satisfied because Kodak allegedly acted "under compulsion" of California's obscenity statute. (Pet. 29-40.) Petitioners base their argument on three decisions of this Court which applied a less restrictive jurisdictional requirement respecting "state action" in a limited number of special cases involving charges of racial discrimination. See Adickes v. S.H. Kress and Company, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); Robinson v. State of Florida, 378 U.S. 153, 84 S.Ct. 1693, 12 L.Ed.2d 771 (1964); and Peterson v. City of Greenville, South Carolina, 373 U.S. 244, 83 S.Ct. 1119, 10 L.Ed.2d 323 (1963). The courts below held these decisions to be inapplicable on the ground that the less exacting "state action" requirement applied by this Court

in those racial discrimination cases does not apply here. (EX 390-91.) Their conclusion should be upheld.

The record clearly shows that Kodak did not adopt and is not implementing its challenged policy by reason of any state (or federal) statutory or other governmental directive that Kodak and other film developing laboratories must refuse to return sexually explicit pictures to their customers. Rather, Kodak has unilaterally chosen to act as it does in order to avoid the risk of prosecution under state (and federal) obscenity laws of general application. Petitioners' attempt to bring Kodak's conduct within the ambit of "state action" must be rejected because, as was said in Adams v. Southern California First National Bank, 492 F.2d 324, 331 (9th Cir. 1973), cert. denied, 419 U.S. 1006, 95 S.Ct. 325, 42 L.Ed.2d 282 (1974), "... subjecting all behavior that conforms to state law to the Fourteenth Amendment would emasculate the state action concept."

Furthermore, many Court of Appeals decisions have stated that the less exacting "state action" requirement applied by this Court in the decisions cited by petitioners does not apply outside the context of racial discrimination. Schlein v. Milford Hospital, Inc., 561 F.2d 427, 428 fn. 5 (2d Cir. 1977); Granfield v. Catholic University of America, 530 F.2d 1035, 1046 fn. 29 (D.C. Cir.), cert. denied, 429 U.S. 821, 97 S.Ct. 68, 50 L.Ed.2d 81 (1976); Fletcher v. Rhode Island Hospital Trust National Bank, 496 F.2d 927, 931 (1st Cir.), cert. denied, 419 U.S. 1001, 95 S.Ct. 320, 42 L.Ed.2d 277 (1974); Jackson v. Statler Foundation, 496 F.2d 623, 628-29 (2d Cir. 1974), cert. denied, 420 U.S. 927, 95 S.Ct. 1124, 43 L.Ed.2d 397 (1975); Adams v. Southern California First National Bank, supra, 492 F.2d 324, 333 (9th Cir. 1973), cert. denied, 419 U.S. 1006, 95 S.Ct. 325, 42 L.Ed.2d 282 (1974); see also Scott v. Eversole Mortuary, 522 F.2d 1110, 1119 (9th Cir. 1975) (Judge Ely concurring in part, dissenting in part). These decisions recognized that the reason for this Court's willingness more readily to find "state action" in the area of racial discrimination is that governmental inaction or neutrality in the face of private discrimination has often been found to constitute affirmative encouragement of such activity. Schlein v. Milford Hospital, Inc., supra, 561 F.2d 427, 428 fn. 5 (2d Cir. 1977)."

The decisions of this Court relied upon by petitioners are also distinguishable from the case at bench for another reason: all of them involved refusal of service to customers by places of public accommodation — lunch counters and the like — *i.e.*, establishments having a historical common law duty to serve all in the community. As the district court below found, applying *United States v. Colgate & Co.*, 250 U.S. 300, 319, 39 S.Ct. 465, 63 L.Ed. 987 (1919), Kodak is under no such duty, but is free to deal with whom it chooses. (EX 379:5-20.) A criminal statute which induces a place of public accommodation to practice racial discrimination is one thing for purposes of applying the "state action" doctrine; a criminal statute which induces a private corporation to eschew trafficking in *Miller*-type obscenity is another. 10

The state-action doctrine reflects the profound judgment that denials of equal treatment, and particularly denials on account of race or color, are singularly grave when government has or shares responsibility for them. Government is the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct. Therefore something is uniquely amiss in a society where the government, the authoritative oracle of community values, involves itself in racial discrimination. Accordingly, in the cases that have come before us this Court has condemned significant state involvement in racial discrimination, however subtle and indirect it may have been in whatever form it may have taken. These decisions represent vigilant fidelity to the constitutional principle that no State shall in any significant way lend its authority to the sordid business of racial discrimination. Id., 398 U.S. at 190-91 (emphasis added; citations omitted).

the private party's segregation policy was enforced by use of the state's criminal trespass or vagrancy laws. The private party discriminator was aware that should he choose to discriminate he could call upon the state police power to effectuate his private decision through the imposition of criminal sanctions. Thus, the purposes of the respective state schemes were clearly to foster and encourage racial discrimination and to afford private discriminators a remedy under state criminal law to enforce their decision to discriminate. No such circumstances are present in the instant action regarding Kodak's uniform policy not to return certain sexually explicit pictures to any customers.

⁹Justice Brennan, concurring in part and dissenting in part in *Adickes* v. S.H. Kress and Company, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970), stated as follows:

Only one decision has applied the "compulsion doctrine" of the racial discrimination cases outside of that context. *Doe v. Charleston Area Medical Center, Inc.*, 529 F.2d 638 (4th Cir. 1975), held that a private hospital acted under color of state law when it refused to allow its facilities to be used by the plaintiff for an abortion because the hospital feared criminal prosecution if abortions were permitted. The courts below correctly concluded that the *Doe* decision of the Fourth Circuit stands alone. (EX 401: 1-5.)¹¹ Respondent submits that *Doe* should not be followed in this case.

3. The Courts Below Correctly Held That Kodak's Policy and Practice Does Not Constitute the Exercise of the "Governmental Function" of Censorship.

Petitioners argue that California has by its obscenity statute "delegated" to Kodak the "traditional power and public function of a censor" and that Kodak's refusal to return sexually explicit pictures therefore constitutes "governmental censorship" of petitioners' publishing activity. (Pet. 40-45.)¹² This argument finds no support whatever in the record. In applying its policy and

One ground for the decision in *Doe* was that the state action element is satisfied in the case of a private hospital by the receipt of federal funds under the Hill-Burton Act (42 U.S.C. §§291 et seq.). This view has been rejected by nearly every Circuit, including the Fourth Circuit. Modaber v. Culpeper Memorial Hospital, Inc., 674 F.2d 1023, 1026 (4th Cir. 1982); Ward v. St. Anthony Hospital, 476 F.2d 671, 674-75 (10th Cir. 1973); Taylor v. St. Vincent's Hospital, 523 F.2d 75, 77 (9th Cir. 1975), cert. denied, 424 U.S. 948, 96 S.Ct. 1420, 47 L.Ed.2d 355 (1976); Briscoe v. Bock, 540 F.2d 392, 395-96 (8th Cir. 1976); Musso v. Suriano, 586 F.2d 59, 62-63 (7th Cir. 1978), cert. denied. 440 U.S. 971, 99 S.Ct. 1534, 59 L.Ed.2d 788 (1979); Jackson v. Norton-Children's Hospitals, Inc., 487 F.2d 502, 503 (6th Cir. 1973), cert. denied, 416 U.S. 1000, 94 S.Ct. 2413, 40 L.Ed.2d 776 (1974); Madry v. Sorel, 558 F.2d 303, 304-05 (5th Cir. 1977), cert. denied, 434 U.S. 1086, 98 S.Ct. 1280, 55 L.Ed.2d 791 (1978); Hodge v. Paoli Memorial Hospital, 576 F.2d 563, 564 (3d Cir. 1978); Schlein v. Milford Hospital, Inc., 561 F.2d 427, 428 (2d Cir. 1977).

¹²This contention may also be based on the view that federal obscenity statutes delegate the "public function" of censorship to Kodak. If so, Kodak's arguments in the text also apply to this contention.

practice of refusing to return certain sexually explicit pictures, Kodak neither exercises nor purports to exercise governmental powers. Kodak certainly does not act for the purpose of suppressing what petitioners publish; the independent business judgment reflected in Kodak's policy is simply one of trying to avoid the risk of prosecution under valid obscenity laws. Moreover, petitioners are not in fact "censored", *i.e.*, precluded from publishing their magazines because others are ready, willing and able to develop their film. (EX 138: 5-18; 144: 14-28.) Indeed, by their own admission, if not boast, petitioners are currently publishing what is a "present superior product", judged by what they assert to be their most demanding critical and artistic standards. (EX 274: 4.)

In their effort to bring Kodak's policy within the ambit of the "governmental function" subcategory of "state action", petitioners rely on Marsh v. State of Alabama, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946), wherein this Court held that the Fourteenth Amendment applied to nominally private activities abridging free speech where Alabama had delegated to a private group the power to perform traditionally public functions in governing a town. In Marsh, the Court held that the state could not impose criminal punishment on a member of the Jehovah's Witnesses who distributed religious literature on the premises of a company-owned town contrary to the wishes of the town's management. Of course, the situation of the company town in Marsh is totally different and distinguishable from that of Kodak in the instant case. Unlike the manager of the company town in Marsh, Kodak does not possess the indicia of a government censor, nor does its challenged practice result in the prevention of petitioners' speech to the audience they seek to reach. Unlike the prevention of speech resulting from the enforcement of the town ordinance in Marsh, Kodak's challenged practice does not bar petitioners from publishing and distributing their magazines when and where they choose and with whatever content they choose. At most, Kodak's policy prevents Kodak's knowing participation in petitioners' activities.

Furthermore, in Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 163, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978), this Court, rejecting a proposed expansion of the "public function" element of the

"state action" concept, concluded as follows:

..., even if we were inclined to extend the sovereign function doctrine outside of its presently carefully confined bounds, the field of private commercial transactions would be a particularly inappropriate area into which to expand it.

(Emphasis added.)

This is surely not a case in which to depart from this wise limitation on expansion of the "state action" concept.

C. This Court's Adoption of Petitioners' Contentions That Respondent's Policy and Practice Constitute Both "Governmental Action" and "State Action" Would Be Unfair to Kodak and Others Similarly Situated.

To hold that Kodak's policy constitutes "governmental action" or "state action", or both, would place Kodak in a "Catch-22" dilemma. If Kodak were then to disobey constitutionally valid federal and state obscenity statutes, by returning proscribed sexually explicit pictures to customers, Kodak would risk having to defend itself and its employees against federal and/or state criminal prosecutions.13 If Kodak were to withhold such pictures to avoid violating obscenity statutes, it would risk the filing of actions like this one. In either event, Kodak would have to incur very substantial legal expense, disruption of normal business activity, and the risk of a costly and punitive outcome through criminal prosecutions and/or civil actions brought against the Company and/or its employees. The courts below recognized that to place Kodak in such a situation — i.e., "in the middle" between petitioners and the law enforcement authorities, the true antagonists in the pornography field — would be nothing short of monstrous. We respectfully submit that the same conclusion should be reached by this Court.

¹³A film processing laboratory employee was so convicted in *Gold v. United States*, 378 F.2d 588 (9th Cir. 1967). *Cf. Spillman v. United States*, 413 F.2d 527 (9th Cir.), *cert. denied*, 396 U.S. 930, 90 S.Ct. 265, 24 L.Ed.2d 228 (1969) (conviction under 18 U.S.C. §1461 for mailing undeveloped movie film for processing).

Ш.

THE DISTRICT COURT LACKED JURISDICTION TO ADJUDICATE PETITIONERS' SECOND CLAIM FOR RELIEF BECAUSE PETITIONERS HAVE NO RIGHT OF ACTION AGAINST RESPONDENT BASED ON 42 U.S.C. §1983.

A. Petitioners Have No Right of Action Against Kodak Under 42 U.S.C. §1983 Based on Kodak's Alleged Holding of Federal Patents and Trademarks or Kodak's Compliance With Federal Obscenity Statutes.

Title 42, \$1983 ("\$1983") applies only to a person who acts "... under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia ..." (Emphasis added.) Because the Federal Government is not mentioned in \$1983 (except insofar as the District of Columbia is concerned), petitioners clearly do not have any right of action in this case under that statute insofar as petitioners rely upon Kodak's alleged holding of federal patents and trademarks and Kodak's compliance with or action pursuant to federal obscenity statutes.

B. Petitioners Have No Right of Action Against Kodak Under §1983 Based on Kodak's Alleged Holding of California Trademarks or Kodak's Compliance With California's Obscenity Statute.

In determining whether a person has acted "... under color of any statute, ordinance, regulation, custom, or usage, of any State" — referred to hereinafter as "under color of state law" — within the meaning of §1983, this Court has applied the same analysis and precedents as it has employed to determine whether such a person's activities would constitute "state action" under the Fourteenth Amendment. Lugar v. Edmondson Oil Co., — U.S. —, 102 S.Ct. 2744, 2750, 72 L.Ed.2d — (1982); United States v. Price, 383 U.S. 787, 794 fn. 7 (1966). Accordingly, conduct by a private corporation does not give rise to a claim under §1983 unless the same conduct would give rise to a private right of action under the Fourteenth Amendment. See Jackson v. Metropolitan Edison Company, 419 U.S. 345, 349, 95 S.Ct. 449, 42 L.Ed.2d 447 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972).

We have demonstrated above (in Section II B of this Brief) that Kodak's policy and practice of refusing to return sexually explicit pictures to petitioners does not constitute "state action". We hereby incorporate that argument by reference here as Kodak's refutation of petitioners' assertion of a claim against Kodak under §1983.

IV.

THE DISTRICT COURT LACKED JURISDICTION TO ADJUDICATE PETITIONERS' FOURTH CLAIM FOR RELIEF BECAUSE IT LACKS THE CONCRETE ADVERSENESS NECESSARY TO CREATE A JUSTICIABLE CONTROVERSY.

Petitioners' fourth claim for relief seeks a declaratory judgment against Kodak that specified federal and state obscenity statutes are unconstitutional to the extent that they may be interpreted as prohibiting a film processing company from returning sexually explicit pictures to customers in those instances where development of the pictures 'is merely an interim step in the publishing process of a magazine.'' (EX 10: 1-6.) Petitioners seek a declaration that the federal and state obscenity statutes are unconstitutional both facially and as so applied because, it is said, they operate as a prior restraint creating an impermissible chilling effect upon petitioners' speech. (EX 10: 1-11.)

Petitioners' fourth claim for relief does not allege a case or controversy within the meaning of Article III of the United States Constitution because Kodak has no interest in defending against

¹⁴Petitioners thus appear to assert that because they are magazine publishers, the First Amendment gives them a right of special access to Kodak's facilities to develop their sexually explicit pictures, beyond the rights of members of the general public. This is simply untrue. The Constitution does not require that the media be given special access to sources of information not available to members of the general public. *Pell v. Procunier*, 417 U.S. 817, 834, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974) (upholding the constitutionality of a California prison regulation barring members of the news media from conducting face-to-face interviews with preselected inmates). *Cf. Zemel v. Rusk*, 381 U.S. 1, 17, 85 S.Ct. 1271, 14 L.Ed.2d 179 (sustaining the Government's refusal to validate passports for travel to Cuba which restricted the free flow of information about that country — "The right to speak and publish does not carry with it the unrestrained right to gather information.").

this claim or upholding the challenged enactments. This case therefore lacks the concrete adverseness necessary to create a justiciable controversy within the meaning of article III, section 2, clause 1 of the United States Constitution and the Federal Declaratory Judgment Act (28 U.S.C. §2201). (EX 392-94.) The courts below accordingly and correctly held that they did not have federal subject matter jurisdiction to determine the constitutionality of the challenged state and federal obscenity statutes. Golden v. Zwickler, 394 U.S. 103, 108, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969). The standard for finding a justiciable controversy is, of course, no less demanding in a declaratory judgment action than in any other type of federal court action. Societe de Conditionnement v. Hunter Engineering, 655 F.2d 938, 942 (9th Cir. 1981); Western Mining Council v. Watt, 643 F.2d 618, 623-24 (9th Cir.), cert. denied, 454 U.S. 1031, 102 S.Ct. 567, 70 L.Ed.2d 474 (1981).

In the instant case, no representative of California or the federal government is before this Court to assert the constitutional validity of the challenged California and federal obscenity statutes. Kodak does not have a personal stake in the outcome of plaintiffs' declaratory relief claim nor any intention of resisting it. Under these circumstances petitioners' fourth claim for relief does not "assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); see also League of Women Voters of California v. Federal Communications Commission, 489 F.Supp. 517, 520 (C.D.Cal. 1980) (no sufficient genuine adversity where defendant FCC did not present any arguments in support of the challenged statute forbidding noncommercial broadcast licensees to editorialize or oppose political candidates).

Petitioners argue that there is no showing that their fourth claim for relief constitutes a "collusive" action between themselves and respondent Kodak. (Pet. 50.) That is true but irrelevant. The district court lacked Article III jurisdiction not because Kodak intends to collude with petitioners in having the challenged federal and state obscenity statutes struck down but because Kodak is a neutral on the issue of their constitutionality and neutrality does

not meet the requirements of Article III jurisdiction.

Petitioners point to the existence of 28 U.S.C. §2403, permitting state or federal government intervention in actions relating to the constitutionality of challenged statutes affecting the public interest, as affording protection against this becoming a "collusive" action. (Pet. 49-52.) However, as the district court correctly concluded (EX 393-94), the existence of §2403 cannot by itself generate an actual case or controversy where none existed between the private litigants. *United States v. Johnson*, 319 U.S. 302, 63 S.Ct. 1075, 87 L.Ed. 1413 (1943); *Ruotolo v. Ruotolo*, 572 F.2d 336 (1st Cir. 1978).

V.

ASSUMING, ARGUENDO, THAT THE DISTRICT COURT HAD JURISDICTION TO ADJUDICATE PETITIONERS' SECOND, THIRD AND FOURTH CLAIMS FOR RELIEF, THE PETITION FOR CERTIORARI SHOULD BE DENIED BECAUSE NONE OF PETITIONERS' CLAIMS HAS SUBSTANTIVE MERIT.

Even if this Court were to decide that Kodak's policy and practice of refusing to return sexually explicit pictures to its customers constitutes "governmental action" or "state action" or action "under color of law", and if the Court were also to conclude that petitioners' fourth claim for relief presents a justiciable controversy, it would not follow that petitioners had stated viable claims for relief in their complaint herein. Those decisions would only mean that the district court had jurisdiction to adjudicate petitioners' second, third and fourth claims for relief. There would then remain the question whether any of those claims has substantive merit, *i.e.*, whether federal and state obscenity statutes, as applied to petitioners through Kodak's policy and practice, are unconstitutional. That question, if reached by this Court, should be answered in the negative.

Kodak withholds from its customers only sexually explicit pictures falling within the *Miller* guidelines the mailing or delivery of which is proscribed by constitutionally valid federal and state obscenity laws. (EX 100-04.) This being the case, Kodak's policy and practice does not deprive petitioners of any rights under the First or Fourteenth Amendments or 42 U.S.C. §1983 so long as *Miller* continues to stand as this Court's authoritative decision

with respect to the constitutionality of state and federal legislation proscribing the dissemination of pornography.

We do not understand petitioners to dispute the foregoing or to contend that the sexually explicit pictures which they claim Kodak is under a duty to return to them do not fall within the Miller guidelines. Instead, petitioners appear to contend that because they are engaged in publishing magazines, petitioners have an unqualified constitutional right to have processed and returned all film, however obscene, which they submit to Kodak and other film developers and that insofar as federal and state obscenity statutes interfere with this alleged right, those statutes are invalid. 15 To put the matter another way, petitioners contend that because they are publishers they have a constitutional right to have Kodak process and return to them sexually explicit pictures which Kodak is prohibited by otherwise valid obscenity statutes from returning to other members of the public. In effect, petitioners assert that Miller must be reconsidered and then qualified by this Court to enunciate a special and preferred position which magazine publishers should have under the First and Fourteenth Amendments to the Constitution and 42 U.S.C. §1983.

As we have earlier pointed out, this Court has heretofore declined to treat the media differently than other members of American society insofar as the rights conferred by the First Amendment are concerned. *Pell v. Procunier, supra,* 417 U.S. 817, 834, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974). Kodak respectfully submits that *Pell* was sound and should be followed in this case, if the Court reaches the issue of the substantive merits of petitioners' claims against Kodak.

VI.

THE COURTS BELOW CORRECTLY HELD THAT BECAUSE PETITIONERS FAILED TO COMPLY WITH FEDERAL RULE OF CIVIL PROCEDURE 56(f), THEY CANNOT COMPLAIN THAT THE SUMMARY JUDGMENT MOTION WAS PREMATURE.

Petitioners contend that the district court should not have ruled on Kodak's motion for summary judgment until they had been afforded an opportunity to conduct discovery. (Pet. 54-55.) The

See Petition, pp. iii, 12-13, 16-17, 21-26.

district court rejected this contention because petitioners failed to file an affidavit requesting a continuance of the summary judgment motion pursuant to Federal Rule of Civil Procedure 56(f). (EX 378: 4-7; EX 385-88.) It is well established that a party's failure to take advantage of Rule 56(f) prevents him from complaining regarding the timing of summary judgment. *THI-Hawaii, Inc. v. First Commerce Financial Corporation*, 627 F.2d 991, 994 (9th Cir. 1980); *British Airways Board v. The Boeing Company*, 585 F.2d 946, 954 (9th Cir. 1978), *cert. denied*, 440 U.S. 981, 99 S.Ct. 1790, 60 L.Ed.2d 241 (1979). Therefore, petitioners cannot now contend that the district court acted prematurely in granting Kodak's motion for summary judgment.

CONCLUSION.

For the reasons and based on the authorities discussed above, the petition for writ of certiorari should be denied.

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